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ON THE STATE OF THE DIVORCE MARKET

> "WILT thou have this Man to thy wedded husband, to live together after God's ordinance in the holy estate of Matrimony? Wilt thou obey him, and serve him, love, honour, and keep him in sickness and in health; and, forsaking all other, keep thee only unto him, so long as ye both shall live?" "I will."
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> "I, John, take thee, Mary, to my wedded wife, to have and to hold from this day forward, for better for worse, for richer for poorer, in sickness and in health, to love and to cherish, till death us do part, according to God's holy ordinance; and thereto I plight thee my troth."

These words have great beauty and, for many people, a deep religious significance. For the lawyer the important points are their solemnity and their clarity. They are contractual in the highest possible degree and their meaning is unmistakeable. Nor has it been mistaken. The legal concept of marriage is "the voluntary union for life of one man and one woman to the exclusion of all others" (*per* Lord Penzance in *Hyde* v. *Hyde* (1866) L.R. 1 P. & M. 130, 133). This definition has been constantly quoted and reiterated. It is indeed the foundation of the jurisdiction of the Divorce Court (see *Risk* v. *Risk* [1951] P. 50). Unhappily, however, it is now completely misleading. Both the nature of marriage and its significance in law have entirely changed.

Under the Matrimonial Causes Act of 1937 a marriage cannot normally be dissolved until it has lasted for three years. After that it can, and the dissolution rate runs at something like 30,000 per annum. In other words, marriage has ceased to be anything like a lifelong union; it is simply a union for three years certain, terminable thereafter at the option of the parties. This is a perfectly defensible arrangement if one feels that way about it. Indeed it is one which was advocated long ago by Jeremy Bentham, who proposed "the rendering legitimate contracts for a limited time" in order to meet the requirements of "men who are unable to undertake the charge of a wife or family" and who are accordingly "reduced to a forced celibacy" (*Principles of Penal Law*, Part 3, Chap. 5). The sort of men he had in mind were sailors and people without fixed residence, and also "young men of more elevated rank who expect a fortune or an establishment." This last class

is nowadays perhaps too small to be worth worrying about, but Bentham would probably have been prepared to interpret the class of people without fixed residence as including those who, owing to housing difficulties, have no homes of their own but have to share with other families or their in-laws. Or would he? "Render marriages dissoluble," he wrote (*Principles of the Civil Code*), "there will be more apparent, but there will be fewer real separations. . . . Divorces are not common in those countries in which they have long been authorised. The same reasons which hinder legislators from permitting them deter individuals from availing themselves of them when they are permitted." He might change his mind about this if he could see us now.

So much for the nature of modern marriage. As to its significance (or, at least, its legal significance), the point is that you must have a valid marriage before you can have a divorce. Indeed it is the only condition precedent to divorce which cannot be circumvented somehow. Now divorce is not merely a thriving home industry; it is apparently an indispensable feature of the Welfare State—one of the social services on which the community relies. Everyone seems to be agreed that the nation's divorce must go on. Hence the importance of marriage.

Like many other of the welfare services, divorce has improved out of all recognition in the last forty years or so. "This marriage," I heard a judge say not long ago, "has completely broken down. Obviously there ought to be a divorce." This approach (contrasting so strongly with the antiquated definition quoted from Lord Penzance earlier on) is now constantly in the minds of all who are concerned in supplying the service. The result is perhaps most striking in terms of sheer turnover, which has increased by approximately 2,900 per cent. "Even in 1911 there were only about 1,000 divorces a year." This sounds almost like a voice from another world, though actually it is the language of the Final Report of the Denning Committee on Procedure in Matrimonial Causes (Cmd. 7,024 of 1947). But the technique of the service has also improved enormously. At one time it seemed that housing shortages were going to lead to a serious slump in divorce for desertion, but the situation was saved by the humane discovery that desertion is by no means inconsistent with the parties having continued to live under one roof (see *Smith* v. *Smith* [1940] P. 49, and many subsequent cases). Equally satisfactory is the recent discovery that sexual intercourse between the parties is not necessarily inconsistent with continuing desertion (*Perry* v. *Perry* [1952] P. 203). It is plain that a benevolent blending of these two principles could provide a perfect recipe for Desertion without Tears. Nor does it seem extravagant to look forward to such a development in view of the notable advances made during recent years in the field of "constructive desertion." This branch of the law is showing a healthy vigour and, despite occasional setbacks (as in

Buchler v. *Buchler* [1947] P. 25), its growth continues (see *Lane* v. *Lane* [1952] P. 34).

Meanwhile, however, adultery is holding its own with desertion. It accounts for almost 50 per cent. of the annual output of decrees and, at any rate among the higher income groups, it seems likely to maintain its popularity. Undoubtedly it has certain advantages. In the first place, it has long been recognised that it is unnecessary actually to commit it (see *per* Mr. R. Mackay, M.P., in Parliament, July 18, 1950, *Hansard*, Vol. 477, col. 2,197). The essence of the thing is that one should go through the motions from which adultery will be inferred (see *Woolf* v. *Woolf* [1931] P. 134). These involve a certain amount of trouble and expense in mobilising chambermaids, hotel registers and private inquiry agents, and the experience (which some people find embarrassing) of taking early morning tea in a bedroom with a stranger of the opposite sex. Secondly, these arrangements can be perfected in three months or so instead of the three years required for desertion, and if proper care is exercised in making them one can be reasonably sure that the necessary inference will emerge. Sometimes indeed even the most slipshod arrangements yield good results. An unreported case of this kind which recently came to my notice is instructive in this connexion. A husband's petition, alleging adultery between his wife and a named co-respondent, was heard by a commissioner as an undefended suit. The husband was able to prove a long and friendly association between the wife and the co-respondent, but the actual adultery alleged depended on the evidence of inquiry agents who had kept a nocturnal watch on a lighted window from a long distance through a pair of binoculars, shared between them. The commissioner refused to grant a decree. He recognised that the evidence was the sort of evidence from which adultery is commonly inferred, but he did not choose to infer it in this case. The husband appealed, and the Court of Appeal, after carefully reviewing the evidence and the law and practice in cases of this type, concluded that adultery should have been inferred and pronounced a decree. On this, the co-respondent was arraigned before a domestic tribunal on the ground of his adultery with the wife on the occasion named in the divorce petition—which was alleged to be unbecoming to the dignity of the profession to which he belonged. This was a serious matter. There was now no question of letting it go undefended. The co-respondent stoutly denied the charge and was supported in his denial by the wife. For the first time evidence was received on both sides of the case and the inquiry agents were cross-examined; so effectively indeed that the tribunal had no difficulty in coming to the conclusion that the charge was not made out. A curious feature of the case, which emerged at this hearing, was that no one had been more shocked and disappointed than the co-respondent and the wife when they heard that the commissioner had refused a decree in the first instance. So much so, that they went off together during the

pendency of the appeal and provided convincing evidence from which adultery could be inferred. This they backed by signed confessions giving dates, places and the names of reliable witnesses which they furnished to the petitioner's solicitor. However, the decision of the Court of Appeal made it unnecessary to use this material. The moral seems to be that the golden rule for trying undefended divorce suits is to grant decrees and not to refuse them. The dismissal of a petition may easily result in a great deal of extra expense and a reproof for the commissioner from a higher court, whereas when a decree is granted there can normally be no complaint from anyone.

One must not, of course, overlook the risks of collusion and the intervention of the Queen's Proctor. But these risks are slight if the case is properly handled. Judges show an increasing reluctance to find collusion; and the same may perhaps be said of connivance (see *Gorst* v. *Gorst* [1952] P. 94). In many cases there will be no difficulty if the whole of the relevant negotiations are candidly disclosed to the court. Moreover, the whole subject of collusion is exceedingly technical and surprising success can be achieved if the more obvious pitfalls are avoided. One day a friend of mine addressed me in high good humour. He said that his wife had at last consented to divorce him. "Congratulations," said I (for I knew that he had long been trying to persuade her), "and when will the happy event take place?" He said he thought it should come off about the end of March. Asked whether he had made the necessary arrangements about the Woman Unknown, he said that he was getting round to this and had been recommended to a reliable source. (There was, of course, a Woman Perfectly Well-known who was involved in the affair but it was understood that her name was to be kept out of it.) As the critical week-end drew near he became increasingly distrait. I suppose he had met the lady in question for the purpose of identification, but for all other purposes she was still a woman literally unknown. She turned out to be the last thing he had expected—an unmitigated bore—and the week-end was very trying. "That woman," he said, "would talk the hind leg off a mule." However, he did not have to see her again and a decree was duly granted in March according to schedule. No one ever suggested that there was anything collusive about this. Moreover, this instance emphasises a further advantage of adultery over desertion. The timing is more reliable; it is possible, even before the proceedings have started, to make quite a fair forecast of the date when a decree will be granted. This factor is often of great convenience, especially in the four-handed game (where two pairs of spouses decide to change partners).

But even though the service is becoming more and more effective, it cannot be denied that it is expensive, not to say extravagant. The average cost of an undefended divorce was stated in the Second Interim Report of the Denning Committee (Cmd. 6945 of 1946) to

be about £70. Recent improvements have reduced this figure to something between £50 and £60. One may call it £50 if one does not allow for the salaries of the judges, upkeep of court buildings and other overheads. There are eight judges of the Probate, Divorce and Admiralty Division, seven registrars and something like a dozen clerks, who together account for about £65,000 p.a. in salaries. It is true that the judges now go on circuit, but a great deal of their work remains in London and they try very few undefended cases (which account for 95 per cent. of the whole) in London or elsewhere. The bulk of the undefended work is done before commissioners who receive £15 15s. per day. There are so many of them that court rooms are hard to find, and improvisation in this field has cast a mantle of squalor over what is still deemed to be the High Court of Justice.

This state of affairs is, in one way, highly satisfactory for the legal profession. Large incomes can be made at the Bar out of practices which consist almost entirely of undefended divorces. The hearing of an undefended suit commonly takes between ten and fifteen minutes, though much higher speeds are possible (the late Lord Hewart at one time claimed the native English record). Counsel are paid at an approximate rate of 12s. 6d. per minute for asking a string of leading questions. The paper work involved in settling documents, advising on evidence, and the like can be done by an experienced practitioner almost in his sleep. Some of it indeed can be mass-produced; before the war one of the busiest members of the Probate and Divorce Bar use to settle a divorce petition simply by filling in half a dozen blanks in a mimeographed form from the stock which he carried in his chambers. Undefended divorces also provide useful initial training in court work for young men who are just starting at the Bar.

But to many barristers, and to some judges, the whole business seems undignified and unworthy of the talents of the profession or of the standing of the Bench. Some do not hesitate to describe it as a racket, and Lord Asquith of Bishopstone once remarked that the granting of divorces was the sort of task that Caligula would have delegated to his horse. It is the fact that undefended divorce works almost on the slot-machine principle. As with other machines, the penny occasionally jams and one has to try again; but it is difficult to justify a service charge of £50 at the pier-head. Defended divorce is, of course, a different matter. If the parties insist on fighting out their matrimonial differences in public there is no reason why they should not pay, for the work involved is substantial. Often they have to pay highly, because leading counsel are freely engaged on both sides in such cases (partly for the reason that they have a tendency to last for some days and thus gravely to interfere with the practices of juniors who are busy with undefendeds). In nearly all of these cases it can be said that the marriage has broken down and that there ought to be a divorce,

and the question generally is, not whether a decree is to be granted or not but who is to get it—husband or wife? This is a momentous question indeed since, broadly speaking, a "guilty" husband is liable to continue to maintain his "innocent" wife, but not vice versa. The fundamental issue is often therefore a financial one, and no one will deny that this is a proper subject for dispute and inquiry. Financial settlements, of course, are also involved in undefended divorce cases; but the very fact that the case goes undefended shows that the parties are agreed about which of them shall be deemed to be guilty and which innocent, and the financial problem is merely the ascertainment of the maintenance, if any, which on this basis the husband ought to pay to the wife.

Whether we like it or not, there seems to be no escape from the conclusion that Parliament and the courts have abandoned the notion that marriage is a lifelong union (while still paying occasional lip-service to it) and that the rule that when a marriage has finally broken down there ought to be a divorce has become part of the law of England. The practical result has been two-fold, *viz.* :

(i) Where both parties to a marriage want a divorce they can always get one, though very occasionally they have to make more than one attempt.

(ii) Where one party seeks a divorce and the other resists it, the resistance may be based on hatred, jealousy or vindictiveness; but with such motives and emotions the courts have nothing to do. The really relevant question, and the one which is most commonly at the root of the resistance, is a financial one.

Once these propositions are recognised, it is apparent that the machinery of divorce is quite unnecessarily cumbrous and expensive and that the wealth of judicial talent which it employs is largely misplaced. The learning which has been applied to the task of dissolving marriages is truly impressive both for its volume and for its subtlety. There is a mass of case law, for instance, on the question what does, and what does not, amount to collusion (*e.g.*, *Emanuel* v. *Emanuel* [1946] P. 115), or cruelty (*Squire* v. *Squire* [1949] P. 51), or desertion (*Whitney* v. *Whitney* [1951] P. 251); on the inscrutable question of the standard of proof required to make out a charge of adultery (see M.L.R., Vol. 14, p. 411); and on many other topics of the kind. Moreover, the subject seems inexhaustible. As recently as July 31, 1952, five of the Law Lords declared their inability to agree upon whether the evidence in a particular case justified a finding of cruelty (see *King* v. *King* [1953] A.C. 124). But all these refinements are beside the point if it is accepted that divorces ought to be granted where marriages have broken down. Indeed they are positively subversive; when a first-class piece of legal research produced the ruling in *Russell* v. *Russell* [1924] A.C. 687, it so seriously impeded the flow of business that loud complaints went up from the public and the profession and the law was belatedly altered by the Matrimonial Causes Act, 1950. It

seems astonishing that people should actually have to pay (and pay heavily) for these exercises in legal virtuosity which merely complicate what is normally a simple process and sometimes positively prevent anyone from getting value for his money.

But judicial virtuosity, though it receives a good deal of publicity, is not what the public is principally paying for. Most of the money is invested in the undefended divorce market and here —let there be no mistake about it—there is no question of paying a reasonable rate for the job; what is paid for is simply a series of routine operations by solicitors, counsel and commissioners which are scarcely more difficult than the turning of a handle. Taking 30,000 divorces at £50 each, we find that the annual amount so invested comes to £1½ million, a figure (be it observed) which includes nothing for the vastly greater cost of defended cases, nothing for fancy points which go to the Court of Appeal, nothing for the few cases in which no decree is granted after all, and nothing for the overhead expenses of the service. One wonders whether it is right to expend this huge sum simply on fattening the legal profession when the economic state of the country is so precarious. Accumulated, for instance, over twenty-five years this money would comfortably wipe off the loss on the Groundnut Scheme.

The question is the more pertinent now that the Legal Aid and Advice Act is in operation and a very substantial proportion of these divorces is being paid for out of taxpayers' money. This is not to suggest that undefended divorces are over-priced at £50. They obviously are not, or the market would not be so buoyant. It is the use to which the money is put which seems so unsatisfactory. By all means let those who can afford it continue to pay at the £50 rate, but let the payment be regarded as a purchase tax rather than as a service charge, and let the money be applied to some fruitful purpose (such as the Defence of the Realm or even the relief of Income Tax) instead of to the sustenance of a pedestrian branch of legal practice which has little to recommend it except its startling rate of profit. If the petitions in undefended divorce cases were simply registered, like marriages or motor cars, instead of being subjected to the costly formality of trial by commissioners, the actual expense would be negligible and the fee of £50 would be nearly all profit. The machinery of Legal Aid would still, of course, be available to enable those who could not afford £50 to get reduced terms but, even allowing for this, a net saving of £1 million per annum seems quite feasible.

If it is objected that undefended divorce by registration is undefended divorce made too easy, I answer: first, that it could scarcely be made easier (though it could easily be made less cumbrous) than it is at present; and secondly, that there is no reason why the process should not be made as dilatory, uncomfortable and undignified as public

policy may be thought to require. For instance, the fee of £50 could be made payable only by instalments. On first registration of the petition an instalment of £10 would be paid. At intervals of three months during the following year the parties would have to attend the registration office again, in person and together, make a solemn affirmation that they still wanted to be divorced, and pay a further instalment of £10. On the fourth and final attendance the fee would be £20 and the decree would be made absolute. No money would be repayable if the parties changed their minds about the divorce, nor in any other event. If either of them failed to make the required attendance on the due date all money paid already would be forfeited and they would have to start again with a new petition—like playing Snakes and Ladders. Additional conditions could be imposed; such as that on each of the three-monthly attendances the parties should produce the certificate of a minister of religion that they had been present together at divine service on at least six occasions since the last attendance, or the certificate of a local authority that they had gone through a training course in Civil Defence. Other conditions (such as suspension of driving licences) can easily be devised; and if anyone should suppose that those which I have suggested are somewhat artificial, let him remind himself of the conditions prevailing under the present practice. These are, very commonly, that the husband should pretend to have committed adultery with a woman unknown to the wife (and often to himself as well) and that the wife should pretend that it is this incident which has wrecked her marriage. There is also, of course, the rule that if the husband and wife have agreed that on a decree being granted the one shall settle £10,000 on the other they must on no account mention it to their solicitors until after the decree has been made absolute. To insist that the husband shall climb Snowdon and that the wife shall write the Lord's Prayer on a sixpence does not seem extravagant when set alongside these conditions.

However, I am not concerned to sponsor any particular conditions, but merely to point out (a) that it would be quite easy to attach conditions which would make the process sufficiently irksome for people to think twice about going through with it, and (b) that such conditions need not involve any appreciable expense; in other words, practically the whole of the £50 fee could be preserved as sheer profit.

Defended divorces present more difficulty, but even here a great deal of dead wood could be cut away. Once the parties have separated and one of them has presented a divorce petition it can be taken almost for granted that the marriage has broken down. (George Bernard Shaw was of the opinion—see his letter to *The Times* published July 14, 1950—that divorce for separated couples should be compulsory.) It is sheer waste of time, money and judge-power to make a microscopic examination of the evidence in order

to find out whether the nature of the breakdown is such that it can be fitted into one of the formal categories of matrimonial misconduct which are at present insisted on before a divorce can be granted.[1] If all the learning about collusion, connivance, the *animus deserendi*, and so on were dispensed with, and the court were to concentrate on deciding not whether a decree could be granted but simply upon the terms (financial and other) which were to be attached to it, a very substantial saving would surely result. These terms, and particularly the decision as to custody of the children, are highly important. It is appreciated that one of the factors which affects them is the question which party is the more to blame for the failure of the marriage; and this may involve an inquiry, as at present, into allegations of adultery, cruelty or desertion. But such inquiries would probably be less often insisted on if the decree itself were not at stake. Any competent social worker can determine in the course of a few visits whether a marriage has finally broken down. If the presentation of a petition were followed by a reference to such a person he could look into the matter and issue a certificate. If the certificate confirmed that the breakdown of the marriage was irreparable it could operate, on being filed with the court, as a decree nisi. In every such case it would be implied, prima facie, that the breakdown was due equally to the fault of both parties and questions of maintenance, custody, etc., would be settled (by the same machinery as they now are) on this supposition. If either party wished to challenge this hypothesis he/she would be at liberty to do so, but at his/her own risk. Each could allege any kind of matrimonial misconduct against the other and the issues could be fought out just as defended divorce suits are fought out today—with the difference that in any event there would be a decree and the point to be decided would be merely which was the guilty (or the more guilty) party. If in such proceedings the whole of the blame were fastened on the wife her right to maintenance would be seriously prejudiced and her claim to have custody of the children might be weakened. If the whole of the blame were fastened on the husband no doubt the result would also be reflected in the terms of the subsequent orders as to "ancillary relief." Plainly, however, the husband would have more to gain by success in such proceedings than the wife would. On the other hand, he would normally (as at present) have to pay the whole of the wife's costs of them as well as his own. These considerations would no doubt

[1] The spectacle of disgruntled couples washing their dirty linen in, and at the expense of, the public is far from edifying and far from infrequent. Along with other counsel, I recently drew a substantial fee from the Legal Aid Fund for acting in such a case. The nature of the suit was so disagreeable that part of the evidence was taken in camera. The hearing lasted several days and in the end the petition was dismissed. Since there was no cross-petition the result was that the parties were left exactly where they started. It is difficult to put one's finger on any particular benefit accruing from this expenditure of public money.

operate in very many cases to deter both parties from challenging the fifty-fifty apportionment of the blame which would otherwise be presumed, and which so often corresponds to the facts.

If this sort of machinery were applied to defended divorces it seems likely therefore that far fewer of them would ever be tried. What is certain is that hardly any points of law could arise. Appeals to the Court of Appeal and House of Lords would be almost unknown, and Her Majesty's Judges would be spared the task of unravelling the unlovely network of statute and case law which at present bedevils the jurisdiction of the Divorce Court.

The long and short of the matter is that divorce is one of the few social services which could easily be made not merely to pay its own way but to provide a really worth-while balance of profit. While preserving the right of the citizen to operate in the divorce market to his heart's content, the Government could collect a substantial brokerage on each transaction instead of allowing the cream of the business to be skimmed off by private entrepreneurs, as it now is.

If any reader has survived as such to this point, he might now do worse than look back at the opening paragraphs of this essay and consider where the latter-day debasement of the Christian conception of marriage has landed us. Why, one may well ask, when divorces have become the order of the day, is marriage insisted on as a condition of having one? The numerous people who still believe in God and the numerous lawyers who still believe in the sanctity of contract are alike affronted by the cynical disregard with which the holy estate of matrimony is now treated by the Courts. What happens when people get married in Registry Offices I do not know (for I have not attended such a ceremony), but I am given to understand that the solemnity of the proceedings is much less than it is in churches. At any rate, it should be. There is no need in the present state of the law for a civil ceremony to be particularly solemn, or even particularly contractual, once it is recognised that all the hard terms of the contract have ceased to be binding and that its effect is no longer to produce a marriage in the sense defined by Lord Penzance, but simply to qualify the parties for their subsequent appearance in the Divorce Court. Just as an infant on whom property has been settled becomes, potentially, a ward in Chancery, so a man and woman who get their liaison rubber-stamped by a vicar or registrar become potential wards of the Divorce Court. However, this is not everyone's idea of marriage. It is easy to distinguish between a tenancy for life and a tenancy determinable at the end of 7, 14 or 21 years; and the distinction is equally plain between the engagements assumed by those who are willing to undertake the responsibilities of lifelong marriage for better or for worse and by those who are not prepared to enter for more than a trial run. But at the moment the two things go under the same guise, and

the forms of Christian marriage can be indulged in as a pure fiction by anyone who wants a smart wedding. The true nature of the thing could easily be made plain by legislation; and it would be a graceful concession to the religious scruples of those who still believe in, and try to practise, genuine marriage if the binding character of their engagements were re-established and their marriage lines were officially recognised as something more than the mere certificates of divorce-worthiness which they have now become.

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THE LAW OF THE ACCESSION

It is commonly stated that the succession to the Crown is governed by the Act of Settlement, 1700.[1] This is only indirectly correct as the Crown of England—to which the Act of Settlement relates—came to an end with the Union With Scotland Act, 1706.[2] By this Act a new kingdom entitled the United Kingdom of Great Britain was created.[3] The Crown of this new kingdom was settled on "Princess Sophia Electoress and Dutchess dowager of Hanover and the heirs of her body being protestants,"[4] *i.e.*, on the persons on whom the Crown of England had been eventually settled by the Act of Settlement. Their right to the Crown of Great Britain was to be subject to the conditions contained in that Act and in the Bill of Rights, 1688.[5] These were briefly that:

(a) The person coming to the possession of the Crown should join in communion with the established Church of England.[6]

(b) If the sovereign becomes a papist or marries a papist, he or she is *ipso facto* to forfeit the throne, which is to descend to the next protestant heir as if the offender was naturally dead.[7]

By the Union With Scotland Act, moreover, "the sovereign succeeding . . . shall in all time coming at his or her accession to the crown swear and subscribe that they shall inviolably maintain and preserve the . . . settlement of the true Protestant religion" as by law established in Scotland.[8]

The Crown of Great Britain duly descended from George I to Edward VIII. By His Majesty's Declaration of Abdication Act, 1936,[9] that sovereign and his issue (if any) are excluded from the throne, but otherwise the earlier settlements remain in force. The accession of George VI, which resulted from that Act, raised an interesting question as to the meaning of the words "heirs of the body" in the Acts of Union and Settlement, as he had two daughters but no son. If the phrase mentioned is found in an ordinary will or settlement of real property its meaning is perfectly clear.[10] The property in question goes in the absence of sons to

[1] 12 & 13 Will. 3, c. 2.
[2] 6 Anne, c. 11.
[3] *Ibid.*, Art. I.
[4] *Ibid.*, Art. II. Similar provision is made in the Act of Union with Ireland, 1800, art. II.
[5] 1 Will. & Mar. (Sess. 2), c. 2.
[6] Act of Settlement, s. 3.
[7] *Ibid.*, s. 2.
[8] s. 2.
[9] 1 Edw. 8, c. 3.
[10] Littleton, ss. 14 *et seq.* and Coke thereon; *North* v. *Martin* (1833) 6 Sim. 266; *Van Grutten* v. *Foxwell* [1897] A.C. 658, 662–4.

the daughters of the *de cujus* as co-heiresses.[11] It is therefore not surprising that suggestions were seriously made in 1937 that legislation should be urgently introduced to confine the descent of the Crown to the eldest of a sovereign's daughters.[12] No such legislation was in fact introduced, but none the less on February 6, 1952, the Crown came "solely"[13] to Queen Elizabeth II, the elder of the late king's daughters. The object of this article is to attempt to ascertain the legal principles on which it did so.

The most obvious argument against giving the words "heirs of the body" their ordinary real property meaning in the Act of Settlement is that of practical convenience. While the rule of two persons jointly need not necessarily cause inconvenience and even has a precedent in the case of William III and Mary II, the full application of real property canons of descent might well out-Gilbert Gilbert. Thus, if Princess Margaret had been co-sovereign with her sister, she might have had, say, six daughters, all of whom (if they had no brother) might have eventually had to share the throne with the present Duke of Cornwall. This is a *reductio ad absurdum* indeed.

None the less, English law has achieved something quite comparable in the present position of the hereditary office of Lord Great Chamberlain. This office has been the subject-matter of some of the most intricate genealogical litigation imaginable.[14] It has resulted in decisions that the office belongs to the heirs general of an Earl of Oxford.[15] These have included several sets of coparceners, so that one moiety of the office is now vested in the Marquess of Cholmondeley, a half-moiety in the Earl of Ancaster and the remaining half-moiety in the five daughters of the first Marquess of Lincolnshire or their representatives. One of these ladies has no surviving son but five daughters, so that the Lord Great Chamberlain is now composed of seven and will be composed of eleven persons![16] This might very well happen to the Crown if the contention is right that "heirs of the body" in the Act of Settlement means "heirs of the body" as used in real property settlements.

11 Or the issue of deceased daughters.

12 "If embarrassing differences of legal opinion are not to arise in the Empire at a time when there is no authority in existence with power to resolve them, it seems essential to pass a new Succession Act without delay, declaring whither, in default of male heirs to His Majesty, the Crown is to pass" (*The Times*, Dec. 19, 1936). *Cf.* Wade & Phillips' doubt (*Constitutional Law*. 2nd ed., 165). The question was still being hotly debated in *The Coat of Arms* as recently as January, 1952.

13 From the Proclamation. (*London Gazette*, Feb. 7, 1952.)

14 For an account see *The Complete Peerage*, X, App. 5.

15 But the account mentioned shows that the House of Lords chose the wrong earl, as well as making other errors of both fact and law.

16 See Debrett, *Peerage*, under the titles mentioned. By arrangement among the co-heirs Lord Cholmondeley acts as acting L.G.C. in alternate reigns (including the present one), Lord Ancaster and the Lincolnshire nominee taking turns to succeed him.

But a *reductio ad absurdum* is not a sufficient answer to a serious legal contention of this kind. In interpreting technical words of art—especially in a statute—the courts should adhere to their correct technical meaning unless there is some very strong reason against this.[17] Parliament must be deemed to have understood the true meaning of the terms which it employs.

There appear to be at least three possible lines of attack. We may suggest that as the Crown is not real property the rules relating to real property are irrelevant; we may contend that the descent of the Crown at common law shows that an elder sister took alone and that the legislature must have had this in mind when using the term " heirs "; we may even argue that the personality of the sovereign is not a matter for law at all, but is on the Austinian theory of " sovereignty " an axiom from which all law is derived.[18] This last view is clearly inconsistent with the wording of many statutes.[19] Thus as early as 1350 Parliament enacted that " the *law* of the Crown of England is, and always hath been such, that the children of the Kings of England, in whatsoever parts they be born, in England or elsewhere, be able and ought to bear the inheritance after the death of their ancestors." [20] The Act of Settlement itself proceeds on the basis that the succession is a matter which can be regulated by law.

If it is accepted as a first principle that succession to the Crown is regulated by law, the important problem arises: by what system of law is it to be regulated ? There appear to be two possible alternatives: (a) it may be regulated by the municipal law of the country concerned, including of course any statutory changes in that law made from time to time; (b) it may be regulated by some external, unchangeable system of law, whether it be called Divine Right or Natural Law or *Jus Gentium*.

The latter view is out of countenance in England today, as for some centuries past, although it still forms the basis of monarchical claims on the Continent, *e.g.*, of Don Juan de Borbón y Battenberg to the existing throne of Spain.[21] It is notorious that this view attained its apogee under the Stuarts in England. It is well expounded by Craig, an ardent supporter of James VI and I:

> " To refute them " (*i.e.*, those who objected to James as an alien) " it is enough to point out that the rules of succession to the Crown are not precisely the same as those

[17] " It is a stringent rule of construction that in construing an Act of Parliament or a deed containing technical words those words must be given their technical meaning " (*per* Farwell J., *Masons* v. *Bolton's Library, Ltd.* [1913] 1 K.B. 83, 90).

[18] The Austinian sovereign is, of course, Parliament, but this cannot exist without a monarch.

[19] *e.g.*, 1 Eliz. 1, c. 3; 1 Mar. 1 (Sess. 3), c. 1; 1 Jac. 1, c. 1; 2 Will. & Mar. c. 1.

[20] 25 Edw. 3, st. 1.

[21] On this " Jacobite " argument the present monarch would be Prince Rupprecht of Bavaria. He descends from a daughter of Charles I. (Townsend, *Descendants of the Stuarts*; *Almanach de Gotha*.)

> which apply to private inheritance. The latter are prescribed by statute or common law of the realm . . . the former are unaffected by regulations of this kind and depend on the principles of natural justice and of universal public law as observed by all well-constituted nations and states." [22]

Yet on an examination of the comparative law of monarchical succession, these principles are hard to find. On the simple question whether a female heir of line is to be preferred to a collateral male heir the kingdoms of Europe were unable to agree. Moreover some of them have changed the rule,[23] thereby demonstrating that Craig's theory must be incorrect.

Having reached the conclusion that the succession to the Crown of Great Britain must be governed by English law,[24] we must now ascertain what that law was before the Acts of 1700 and 1706 to see if it will give us any guidance in interpreting the words " heirs of the body " in a special manner. It is clear that at common law the Crown was not elective but hereditary. This was expressly held in *Calvin's Case*,[25] which established that the next sovereign succeeds by mere survivance—no further act of election, recognition, proclamation or coronation being necessary. An exception to this occurred at an abdication. When Richard II abdicated the throne became vacant [26] and it fell to the Lords spiritual and temporal, and commons, to elect a successor. They passed over the next heir (who was a minor) and chose the Duke of Lancaster—Henry IV, on whom and the " heirs of his body " the Crown was then entailed.[27] This was an exact precedent for the events of 1688–89. The abdication of 1936 involved no such interregnum, as it was carried out by a statute which itself caused an immediate demise of the Crown in favour of the next member of the Royal Family.[28]

If, then, the Crown was hereditary at common law—apart from abdications—its descent may furnish us with some guidance as to the meaning of " heirs of the body " in the Act of Settlement. Yet the odd thing is that no sovereign of England before George VI has died, since the Conquest at least, leaving more than one daughter but no son.[29] Hence there is no exact precedent to guide us. It is true that Edward VI died leaving two half-sisters as his next-of-kin, but they were at the time both illegitimate by statute [30]

22 *Jus Feudale* I, 14, 8. (Lord Clyde's translation.)
23 Most recently Luxemburg, which separated from the Netherlands as it had the Salic law on the accession of Wilhelmina I, but is now ruled by a Grand Duchess (Charlotte).
24 Not Scots law (Act of Union, art. II). Scots heritage law allows the eldest co-heiress the right to indivisibles such as a peerage or principal mansion house.
25 (1608) 7 Co.Rep. 1a.
26 Holinshed, *Richard II*, 41.
27 7 Hen. 4, c. 2.
28 1 Edw. 8, c. 3.
29 See, *e.g.*, the genealogies in Burke's and Foster's *Peerages*.
30 28 Hen. 8, c. 7, ss. 5, 6.

and owed their successions *seriatim* to the provisions of another Act,[31] which called them to the throne as *personae designatae*. Moreover the half blood was excluded in the intestate succession to real property at common law.[32] Hence their succession is a very poor precedent for the general proposition that coparcenary is unknown in successions to the Crown. Nor is the preference of Mary II and her husband over Anne and hers in 1689 any better. Their title was emphatically elective and not by way of succession.[33] But the succession of James VI of Scots to the English throne in 1603 does give us a precedent of sorts. He took as representative of Queen Margaret, elder daughter of Henry VII, excluding Lord Beauchamp, the representative of the younger daughter, Queen Mary, Duchess of Suffolk. Even here the case is not quite clear as Beauchamp's claim was dubious. There is considerable doubt as to the legitimacy of his descent from Henry VII and several of the steps were through attainted ancestors.[34] As late as 1593 a long book was filled with speculations as to who would succeed Elizabeth I, the betting, incidentally, being heavily against James.[35]

Thus the common law precedents against coparcenary are most unsatisfactory. Coke and Blackstone dogmatically assert that it was inapplicable, but can cite no authorities.[36]

We must therefore fall back on the first-mentioned point that the Crown is not real property and therefore knows different succession rules. Those who assert that coparcenary should occur make an assumption that the real property rules must apply. If this was correct many of our medieval kings, as well as all those after 1689, would be usurpers.[37] We can see that something which descends to heirs of the body need not necessarily go exactly like real property by considering peerage titles. These are more like the title to the Crown than is the title to a piece of land. A peerage is now usually settled on the heirs male of the body of the grantee, but baronies by writ and certain other old dignities go to heirs general. If a peer holding such a title dies leaving only daughters the peerage does not vest in them all as coparceners. *A fortiori*, then, the Crown. Such peerages, however, fall into abeyance until such time as there is only one of the co-heiresses or her issue surviving.[38] If the contention against the elder

31 35 Hen. 8, c. 1.
32 Changed by Inheritance Act, 1833.
33 See the language of the Bill of Rights, 1689.
34 See four different allegations of bastardy in the book cit. in n. 35, pp. 104 *et seq*. Their claims may also be considered forfeited under 28 Hen. 8, c. 7 for the plot to put Jane Grey on the throne.
35 *A Conference about the Next Succession to the Crown of England*, Doleman, Amsterdam, 1593.
36 Co.Lit. 165a; *Commentaries*, 4th ed., I, 167.
37 It is true that a statute may alter the real property rules, but the Bill of Rights is not a statute unless we assume William and Mary's right as elected sovereigns to give the Royal Assent.
38 Cruise, *Dignities*, 2nd ed., 180 *et seq*.

daughter's sole claim is correct, surely it would be more reasonable to treat the Crown as a peerage than as a land estate ?[39] Should we not now have a kingless kingdom (as Spain now is), the Crown remaining in abeyance until one or other of the daughters of George VI is dead and her issue extinct ? The Regency Act, 1937, directs a regency where " the Sovereign is for some definite cause not available for the performance of (the royal) functions."[40] Would this not be such a case ? The trouble is that by the same Act the regent is to be " that person who . . . is next in the line of succession to the Crown."[41] This would presumably result in a co-regency as farcical as the co-sovereignty considered earlier.

But there is really no more reason why the Crown should be subject to a peerage than to a real property rule of succession. The Crown is not a peerage. It is not a mere title of honour. Only the old counties palatine, which had *jura regalia*, can be considered comparable with the Crown. Of those held by laymen, both Lancaster and Chester furnish precedents of sorts. Henry, Duke of Lancaster, on his death in 1360 left two daughters. Of these the younger married John of Gaunt, and he was recognised as Earl of Lancaster *jure uxoris* in the lifetime of her elder sister.[42] This is a strong precedent against the *droit d'ainesse*, but we may note that the elder sister was married to an alien. On the death of Ranulph de Blundevill, fourth earl palatine of Chester, in 1231, his co-heirs were his sisters. The Crown granted the palatine to the eldest son of the eldest sister, who was still alive. This poor precedent is weakened still further by the events on this earl's death in 1244. The Crown annexed the palatine *ne tam praeclara dominatio inter colos feminarum dividi contigeret.* The elder daughter of the senior co-heir (sister of the earl) claimed the palatine before the House of Lords, but although the claim was admitted by the other co-heirs, the Crown refused to make a grant comparable with that in 1231.[43] Hence the precedents in connection with palatines do not favour the interpretation of " heirs of the body " in any special sense.

We can only rely on the argument that, as the Crown is not real property, nor a peerage, nor a county palatine, but *sui generis*, its descent need not follow the lines customary in any of these things. The courts in interpreting the phrase " heirs of the body " in the Act of Settlement are not bound by their decisions on the meaning

[39] " Before Edward I proceeded to hear the claims of Bruce and Baliol . . . he put the following question to the parliaments of both kingdoms . . . By what law of succession is the right of succession to the kingdom to be determined? The answer made unanimously . . . was that the right of succession to the kingdom is to be judged by the rules observed in the case of counties, baronies and other impartible tenures." (Dalrymple, *Feudal Property in Great Britain*, 189.)

[40] 1 Edw. 8 & 1 Geo. 6, c. 16, s. 2.

[41] *Ibid.*, s. 3.

[42] *Complete Peerage*, tit. " Lancaster."

[43] *Ibid.*, tit. " Chester."

of these words in other connections. Indeed, by acknowledging Her present Majesty as sole Queen they have given the phrase a special meaning confined to the Crown, *i.e.*, that it implies primogeniture among females as well as among males. This conclusion can be legitimately reached by looking at the whole scheme of the Acts of Settlement and Union, which in other sections [44] clearly contemplates the sovereign as being necessarily a single individual. In construing phrases in statutes the same rule applies as in construing other documents: that the whole Act is to be looked at. The general intention overrides the particular intention.[45] It is true that the scheme of the Acts gives us no indication as to how the single individual is to be chosen *inter pares*, but the maxim *qui prior est tempore potior est jure* favours the eldest co-heir, as does analogy from the rule as to male claimants. As remarked earlier, the most significant argument of all is that *ab inconvenienti*.

The accession of our present Queen thus elucidates the constitutional position. In several other ways her accession was of special interest. Thus, *e.g.*, she was the first sovereign since George I to be outside the country at her accession. This resulted in her being proclaimed Queen before she had made the usual declaration that she was a faithful protestant, or taken the oath to maintain the established Church of Scotland. " Judicial notice " was taken of her protestant status without formal proof of any kind. We need not speculate on what would have been the legal position if on returning to London she had announced her conversion—or that of her husband—to papacy. Nor need we invite trouble by asking: " What is a protestant ? " (Many Anglo-Catholic members of the Church of England deny that they are protestants.) But what is not clear is why there was such a hurry to proclaim her. The successor of a dead sovereign reigns at once without further formalities.[46] Nor does any public office now become vacant on a demise of the Crown.[47] Can the hurry not possibly have been due to a desire to make it abundantly clear that the Crown had come " solely " to Her Majesty ?

But we may note with all deference that another assumption was made by " judicial notice " on less certain ground than that Her Majesty was a protestant. A woman is in law never too old to have children.[48] Ought not therefore the oath of allegiance and the proclamation to have contained a formal saving of the rights

[44] *e.g.*, those relating to being converted to Rome or marrying a papist.

[45] *Towns* v. *Wentworth*, 11 Moo.P.C. 526, 543; *Robinson* v. *Robinson*, 1 Burr. 38.

[46] *Calvin's Case*, n. 25, supra.

[47] Demise of the Crown Act, 1901, s. 1. But see n. 16 as to the acting Lord Great Chamberlain.

[48] Co.Lit. i, s. 53; *Re Dawson* (1888) 39 Ch.D. 155, 160 *et seq.*; *Ward* v. *Van der Loeff* [1924] A.C. 653, H.M. Queen Elizabeth the Queen Mother was not in any case beyond an age at which medical opinion would consider childbearing impossible.

of any posthumous son of George VI ? If such a child had been born, his claim to the throne would have been indisputable. Moreover, on the principle *qui in utero est pro jam nato habetur, quoties de ejus commodo quaeritur*, his reign would have begun at the death of George VI. During the period before his birth, however, his sex being unknown, his right and that of the late king's elder daughter would have both had to be in suspense until events showed which was entitled. A regency would clearly have come about, " The sovereign (being) for some definite cause not available for the performance " of the royal functions.[49] To whom, it may be asked, would the oath of allegiance have been taken in this event ? When exactly this situation occurred in Spain on the death of Alfonso XII, the future Alfonso XIII being *in utero* with two living sisters, the Cortes took the oath non-committally to " the heir of Alfonso XII."

Never before has a sovereign come to the throne having a living mother and grandmother, both queens.[50] Interest was naturally aroused by the fact that the Queen was the first since Anne to succeed to the throne with a living husband, and the first ever to do so with living children. Her son automatically became Duke of Cornwall and Rothesay, Earl of Carrick, Baron of Renfrew, Lord of the Isles and Great Steward of Scotland.[51] Her daughter dropped the suffix " of Edinburgh." [52] But it was the Queen's husband's title which aroused most public interest. The precedents are very varied. Mary I and Mary II's husbands had the title of king,[53] Anne and Victoria's had not. The latter's, after many years of married life, received that of Prince Consort.[54] Obviously it is for the Queen herself to decide on her husband's designation, but we may just note that the Sex Disqualification Removal Act, 1919,[55] enacts that no one shall be barred from any "public function " or office by reason of sex. If the position of crowned consort of the sovereign be a public function (as it surely is), then the Duke of Edinburgh should not be barred from it on the grounds of sex. In view of the 1919 Act the precedents are, it is respectfully suggested, quite irrelevant.

C. d'O. Farran *

[49] Regency Act, 1937, s. 2.
[50] Henry VI had a mother and step-grandmother.
[51] *The Complete Peerage*, tit. " Cornwall " and " Renfrew."
[52] Such suffixes are only borne by the grandchildren of the sovereign. The title " Princess Royal " is only borne by one lady at a time, normally the eldest daughter of the sovereign when the vacancy occurs.
[53] Philip was king of England as well as of Spain (see Burke, *Peerage*—royal lineage). William was not king in the Netherlands, but was elected co-sovereign with Mary II.
[54] June 26, 1857. His marriage was in 1840. Anne's husband was known merely as Prince George, Duke of Cumberland.
[55] 9 & 10 Geo. 5, c. 71, s. 1.

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INCONSISTENCIES AND INJUSTICES IN THE LAW OF HUSBAND AND WIFE

(*continued from p.* 49)

III

Creditors' Rights and Household Property

As the law stands today, a creditor who has obtained a judgment against a husband or a wife is often faced with insuperable difficulties if he tries to enforce the judgment against household assets. It is not intended to discuss all aspects of this problem. It would be possible to show that, *e.g.*, as regards bank accounts, the courts have made it almost unbelievably easy for a married couple to frustrate attempts by creditors to obtain a garnishee order so as to enforce a judgment against either the husband or the wife. To attach a joint account, the creditor must have a judgment against both spouses, because the legal title is vested in both. He may, perhaps, be able to prove that beneficially it belongs to the spouse who is his debtor, but this will not help him, as was laid down by the Court of Appeal in *Hirschhorn* v. *Evans*.[45] On the other hand, however, if a bank account standing in the name of one spouse is beneficially owned by the other, neither the husband's creditors nor the wife's creditors will be able to attach it through garnishee proceedings. If, *e.g.*, the account stands in the name of the wife, but all the payments in have been made by the husband, the husband's creditors cannot enforce a judgment against it because the legal title vests in the wife, and the wife's creditors will, as in *Harrods, Ltd.* v. *Tester*,[46] be defeated by the proof that in equity the account belonged to the husband. In this case, *i.e.*, where the law turns against the creditor "regard must be had to the property in equity,"[47] but no such regard is paid to equity where a joint account is beneficially the property of the spouse who is the judgment debtor. All the creditor can do is to lodge a petition in bankruptcy and try his luck under section 42 of the Bankruptcy Act, 1914.

This problem of bank accounts has been mentioned by way of preface for what is to follow. It shows how little the courts have felt able to protect creditors against this type of manipulation of assets between husband and wife, against that shifting of

[45] [1938] 3 All E.R. 491. (Slesser and MacKinnon L.JJ., Greer L.J. dissenting.)
[46] [1937] 2 All E.R. 236. (Court of Appeal: Lord Wright M.R., Romer and Scott L.JJ.)
[47] *Per* Lord Wright M.R. [1937] 2 All E.R. at p. 240.

property from one to the other or from one to both jointly, which was made easy by the generalisation of the law of separate property through the married women's property legislation. The situation as regards bank accounts gives a preview of the results flowing from a law which enables the spouses to present to the world that as separate which is in fact joint property, and that as joint property which is in fact separate.

We are here concerned with tangible assets, with "choses in possession." As regards the wife's clothing and jewellery, the position of her creditors is, in certain limits, safeguarded by decisions such as that of Jeune P. in *Tasker* v. *Tasker*,[48] and perhaps more significantly, by that of the Court of Appeal in *Masson Templier & Co.* v. *De Fries*.[49] In the first of these two cases it was held (in connection with an application under section 17 of the Act of 1882) that presents of jewellery by the husband to the wife were, in the absence of evidence to the contrary, to be considered as absolute gifts and not as a loan of "paraphernalia." In the *De Fries Case* clothes bought by the wife with money supplied by the husband were held to be her property and the old law of "paraphernalia" was, by Farwell L.J., said to have passed into legal history with the enactment of the statute of 1882.[50] Nevertheless, even as regards assets of this type the vistas opened by *Rondeau, Le Grand & Co.* v. *Marks*[51] are disturbing. There the Court of Appeal held that, while a husband could not be presumed only to have lent to his wife the clothes she bought with the money he gave her, there was nothing to prevent him from making an "arrangement" with her that they should be his property and worn by her only during his pleasure. Such an arrangement was only a fact from which the court was able to draw an inference as to the intention of the parties, it was not a "contract" capable of being assailed on grounds such as lack of consideration or violation of public policy or fraud on the creditors. It is not easy to see why the court should have gone out of its way to countenance what no reader of the report can help suspecting to have been a machination by the spouses to defeat their creditors.

All this, however, fades into insignificance compared with the position now prevailing with regard to household furniture. One cannot resist the temptation of looking at this problem for a moment from the point of view of common sense and without considering the cases which have been decided. Husband and wife live together in amity in a house filled with normal household furniture. The furniture would, by the vast majority of married couples and their friends, be considered as "their furniture," and

[48] [1895] P. 1.
[49] [1909] 2 K.B. 831. (Cozens-Hardy M.R.; Farwell and Kennedy L.JJ.)
[50] At p. 839.
[51] [1918] 1 K.B. 75. (Court of Appeal: Pickford and Bankes L.JJ., Sargant J.; affirming Bailhache J. [1917] 2 K.B. 636.)

the question whether this bed belonged to the husband or that wardrobe to the wife would be regarded as bordering on the faintly ridiculous. "Gifts" or "sales" of household articles by the husband to the wife or by the wife to the husband would perhaps be suspected as indicating that something was wrong with the marriage and that a separation or a divorce was imminent. Creditors of either husband or wife or both would see them both in possession (using this word in a strictly non-technical sense) and might be regarded as morally entitled to consider them potentially as assets available for the enforcement of claims against either. It is, in the submission of the writer, an elementary requirement of legal policy that creditors should be allowed to rely on what they see and that secret transactions ought not to affect their rights. That this is the policy of the law, is shown by the Bills of Sale Acts.[52] Shorn of technicalities, their tendency is to prevent an owner of property from withdrawing it from his creditors by a transfer to a third party without having given publicity to that transfer, either by giving up possession or by registering the transaction. If the debtor remains in possession of goods transferred to a third party and does not register the transfer, then he and the third party cannot complain if the goods continue to be treated as his for the purpose of enforcing creditors' rights. Those rights must not be affected by a secret shifting of assets. Creditors can rely on the appearance of things and do not have to try to look behind the scenes where the evidence available to them and to their legal advisers is apt to be elusive while that at the disposal of the debtor can all too easily be "prefabricated."

One would have thought that, once the rule of separation of property of husband and wife had become part of the law, there would have been no more important field for the application of the Bills of Sale Acts than that of household property. Once it was the law that the bed and the wardrobe did not, as they used to do, belong to the husband nor, as might have been held, to the married couple jointly, but either to the husband or the wife, it became desperately easy to shift them from one to the other without anyone outside being the wiser. Roman law,[53] and the Continental legal systems which were influenced by it,[54] tried and try to cope with this situation by what is commonly known as the

[52] Bills of Sale Acts, 1878 and 1882, 41 & 42 Vict c. 31, and 45 & 46 Vict. c. 43. The latter Act does not, according to its section 3, apply to bills of sale and other documents mentioned in s. 4 of the 1878 Act which may be given otherwise than by way of security for the payment of money. Since we are dealing with gifts and sales, we must therefore ignore the 1882 Act. The principal importance of this is that the key section 8 of the 1878 Act, though "repealed" by s. 15 of the 1882 Act, must be treated as fully in force for our purposes, and has been so treated in the cases we are about to discuss.

[53] D. 24, 1, 51 (Pomponius); C. 15, 16, 6.

[54] French Civil Code, Art. 1499; German Civil Code, para. 1362; Swiss Civil Code, Art. 196. (Also Art. 193 and Art. 215.)

Praesumptio Muciana, according to which all goods in the possession of a married woman were presumed to have been given to her by her husband so that, as a result of the invalidity of gifts between the spouses, they were available for execution by the husband's creditors. In a world in which, broadly speaking, the husband but not the wife was likely to incur business debts, this rule did much to protect creditors against manipulations of assets between the spouses. Whether it can do so today is another matter. In any event the rule and its derivatives in modern Continental legislation [55] gave effect to a policy which, one would have thought, was also that of the Bills of Sale Acts—or might have been, had it not been for the cases we must now consider.

Since the problem could not have arisen very easily before the Act of 1882, it is not surprising to find that the earliest of the relevant cases was decided in 1894. It was the decision of the Court of Appeal in *Ramsay* v. *Margrett*.[56]

The facts were that the husband was pressed by his creditors, and that he sold the household furniture to his wife with whom he lived in amity. It was alleged, and apparently believed by the court, that the wife paid her husband the purchase price in cash. In any event, he gave her a receipt for it. She sent some of the goods to her bankers, but otherwise there was no change which was outwardly visible. The furniture remained in the house which husband and wife continued to occupy as their matrimonial home. One of the husband's judgment creditors subsequently tried to enforce the judgment against the furniture, the wife claimed it as her property, and an interpleader issue was raised between her and the creditor. The creditor argued that the receipt the husband had given to his wife was a bill of sale within the meaning of section 4 of the Bills of Sale Act, 1878, according to which the expression "bill of sale" includes, inter alia, "receipts for the purchase money of goods." He further argued that, being a bill of sale, this document ought to have been registered under the Act. The wife replied that the receipt was not a bill of sale, but that, even if it was, it was not, under section 8 of the Act, to be "deemed fraudulent and void" as against the execution creditor because the goods were not, after the expiration of seven days from the giving of the receipt, "in the possession or apparent possession" of the

[55] Where, as in Germany, no community of property arises from the marriage in the absence of an express contract, the presumption is to the effect that property vests in the husband, Civil Code, para. 1362; while things exclusively destined to the use of the wife (especially clothes, personal ornaments and her tools) are presumed to be her property. Where, on the other hand, as in France, movable property is held in common (in the absence of a *contrat de mariage*), "*le mobilier existant lors du mariage ou échu depuis est réputé acquêt, sauf preuve contraire, établie suivant le droit commun, à l'égard des tiers*," *i.e.*, presumed to be the spouses' joint property and as such (Art. 1409 *et seq.*) available for the satisfaction of the husband's, and, in certain limits, of the wife's pre- and post-nuptial debts. (Art. 1499.)

[56] [1894] 2 Q.B. 18. (Lord Esher M.R., Lopes and Davey L.JJ.)

husband. The Court of Appeal held that both her replies were well founded. The receipt was not a bill of sale within the meaning of the Act because the transfer of property was already complete when it was given and it was not, therefore, an element of the transaction itself. Moreover, from the moment when the agreement was made the wife was in possession of the goods.

In the present context the first of these two *rationes decidendi* is of little interest. It deals with a technical point of the law of bills of sale and not with a matter of specific importance to the law of husband and wife. It may well be that *Ramsay* v. *Margrett* was correctly decided on this first point, whatever one may think of the second. The question, however, what constituted a change of possession or apparent possession as between the spouses, and the observations by Lord Esher M.R.[57] and by Davey L.J.[58] on this topic go to the root of the problems which form the subject-matter of this paper.

In order to see the problem in its proper setting, and especially in view of the later cases presently to be discussed, one must emphasise that the transaction between the spouses was a sale and not a gift. Hence, these being specific goods in a deliverable state, the sale being unconditional, and no different intention between the parties appearing on the facts of the case, property passed from the husband to the wife when the contract was made, and neither delivery nor a deed was necessary for that purpose,[59] subject, of course, to the need for registration if the Bills of Sale Act applied. In this case, therefore, the problem of possession arose exclusively under the Bills of Sale Act. Who, then, is in possession and who is in "apparent possession" of the household furniture? "The goods were in the house in which husband and wife were living together, and in that state of things you could not say which of them had the actual possession of the goods. What is the rule of law as to possession in such a case?"[60]

The obvious answer to this question would seem to be: both were in possession before the sale and after, *i.e.*, it was a case of joint possession and there was no change either in possession or in apparent possession. Now it seems to be the law that the maker of a bill of sale cannot, for the purposes of the Act, be regarded as being in possession or apparent possession of the goods unless he is or appears to be in sole possession.[61] If this is so, there is a

[57] At pp. 24 *et seq.*

[58] pp. 26 *et seq.* He relied on the judgment of Lord Herschell in *Charlesworth* v. *Mills* [1892] A.C. 231, at p. 242. Lopes L.J. at pp. 25 *et seq.*, refused to express an opinion on the point here under discussion and based his judgment exclusively on the first point.

[59] This is the material difference between this case and *French* v. *Gething* [1922] 1 K.B. 236, and *Hislop* v. *Hislop* [1950] W.N. 124, discussed below.

[60] *Per* Lord Esher M.R. at p. 25.

[61] See *per* Atkin L.J. in *French* v. *Gething* [1922] 1 K.B. at pp. 247 *et seq.* But *quaere*, whether this view is compatible with the definition of "apparent possession" in s. 4 of the 1878 Act: "Personal chattels shall be deemed to

deplorable gap in the law of bills of sale, but this point does not concern the law of husband and wife as such. Had the Court of Appeal in *Ramsay* v. *Margrett* said that registration was not necessary because husband and wife appeared to be in joint possession of household furniture and, for this reason, transactions between the spouses regarding it did not require registration, one would have felt that the law was in need of reform, but one could not have regarded the decision as open to criticism from the point of view of the law of husband and wife. Creditors would have been left unprotected against those invisible changes in title which the Bills of Sale Acts were intended to render ineffective, but, if the reasoning of the court had been based on the fact of joint matrimonial possession, all one could have said would have been that Parliament had failed to adapt its bills of sale legislation to the situation created by the Married Women's Property Acts and that the courts were too conservative to fill the gap. In fact, however, the decision of the Court of Appeal did not rest on the conception of joint possession at all.

The court held that possession vested not in the spouses together but in either of them and that it depended on title. "When the possession is doubtful it is attached by law to the title."[62] The title had passed to the wife, hence possession had passed as well, and there was thus no need for registration. The policy of the Bills of Sale Acts, one would have thought, was that title should attach to possession, but *dis aliter visum*: possession attaches to title, and thus the creditor remains unprotected.[63] The rule that "where possession in fact is undetermined, possession in law follows the right to possess"[64] is of very respectable origin. It goes back to Littleton[65]:

> "Where two be in one house or other tenements together to claim the said lands and tenements, and the one claimeth by one title, and the other by another title, the law shall adjudge him in possession that hath right to have the possession of the same tenements."

In 1847 the rule was reaffirmed by Maule J.[66] The relevant words were:

be in the 'apparent possession' of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used or enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken or given to any other person." With great respect, the case of *Shepherd* v. *Pulbrook* (1888), 4 T.L.R. 642 (Court of Appeal), quoted by Atkin L.J. at p. 248, does not seem to support the proposition, but it is very difficult to ascertain from the scanty report what that case really decided.

62 *Per* Esher M.R. [1894] 2 Q.B. at p. 25.

63 Paraphrasing Art. 2279 of the French Civil Code one may thus say that in this country, in so far as Littleton's principle applies, "*En fait de meubles, le titre vaut possession.*"

64 *Pollock and Wright on Possession*, p. 24.

65 Tenures, s. 701.

66 *Jones* v. *Chapman*, 2 Ex. 803, at p. 821.

> "It seems to me that, as soon as a person is entitled to possession, and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by the command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is which of the two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser."

The rule is thus intended to solve problems arising from disputed possession between persons claiming under adverse titles. Neither from Littleton; not from the dictum of Maule J., nor from Pollock and Wright can it be gathered that the rule was ever intended to allocate possession to one of two or more persons who in fact possessed jointly and intended to do so. Nor does the present writer know of any case, prior to *Ramsay* v. *Margrett*, in which the rule had been applied to chattels. The application of this old rule to household furniture is a striking illustration of the evils which spring from the application to matrimonial property of rules designed to regulate the relation between strangers. In this connection it is particularly artificial to ignore the facts of joint use of goods in the household and to treat the spouses as adverse claimants of that which, in the nature of things, they possess together and must so possess. The old rule laid down by Littleton presupposes that the possessor is unascertainable. In the case of household furniture this is not the case. Both spouses are, or ought to be held to be, in possession.

Moreover, as indicated by Evershed M.R. in the recent case of *Hislop* v. *Hislop*,[67] the argument which formed the basis of *Ramsay* v. *Margrett* involved a vicious circle. The question was whether, as against the husband's creditor, the wife had acquired the legal title to the furniture. If the receipt was a bill of sale, this depended on whether she had obtained possession or apparent possession. This was said to depend on whether she had obtained the legal title which, for this purpose, she was assumed to have done. With great respect, one is tempted to consider this as almost a textbook example of "begging the question."

Finally, and decisively, the decision is at variance with the purposes and the wording of the Bills of Sale Act. Section 8 of the Act of 1878 speaks of "chattels . . . which . . . are in the possession or apparent possession of the person making such bill of sale . . . ," and thus lays down that registration is required if the goods leave the possession of the transferor but remain in his

[67] [1950] W.N. 124

apparent possession. Davey L.J. dealt with this point.[68] He asked whether it was necessary that there should be a change in the ostensible possession, and answered this question in the negative :

> " You need not inquire who has the apparent possession, but only whether there was a possession as between the person giving it and the person taking it (*i.e.*, the bill of sale). Here the goods were in the conjugal domicile, and were being used by the husband and the wife for the purposes of that domicile. Under the circumstances I draw the inference, and I think it is an irresistible inference, that the intention was that the goods should become the separate property of the wife out and out. . . . In other words, the intention was that both the property in the goods and the possession of them should pass at once to the wife. And this intention was carried out, for she appears to have exercised the power of disposition of the goods without any consent of her husband. The fact that the goods remained in the house as before was equally consistent with their being in her possession as with their being in his possession. If there had been a formal delivery of the goods to the wife, there could have been no question, but I do not think that such a delivery was necessary. I should be prepared to hold that the plaintiff (*i.e.*, the wife) had sufficient possession of the goods to take the case out of the Bills of Sale Act."

Here the " screening " principle of the Bills of Sale Act is completely ignored. Apparent possession as affecting the outside world is identified with possession as between transferor and transferee,[69] the intention of the spouses with the outward appearance of objective facts. Facts referring to those goods which the wife had taken out of the house were allowed to serve to interpret the legal position with regard to those which remained there. The " ambiguity " of the objective situation which had not changed was held to yield an unambiguous appearance.

[68] [1894] 2 Q.B. at p. 28. Davey L.J. quoted the judgment of Lord Herschell in *Charlesworth* v. *Mills* [1892] A.C. 231 at p. 242. This, however, was a case arising under the Bills of Sale Act, 1882, and Lord Herschell emphasised at pp. 240 *et seq.* that the 1878 Act was irrelevant except in so far as it defined a bill of sale. Under the 1882 Act " apparent possession " is immaterial. This, and only this, it is submitted, is the true explanation of the dictum of Lord Herschell quoted by Davey L.J. It is, with respect, incomprehensible, how the words of Lord Herschell could have been quoted by Davey L.J. in support of his proposition. Lord Herschell said that you had to see whether there was " a possession between the person giving it (the bill of sale) and the person taking it," but he introduced these words by saying: " The question whether it is a possession which excludes the apparent possession of the other party might arise under the Act of 1878; but it is not of the slightest importance in the present case." It was, however, of vital importance in *Ramsay* v. *Margrett* which arose under the 1878 Act, but nevertheless Davey L.J. quoted Lord Herschell as if his words covered the case Davey L.J. had to decide.

[69] *i.e.*, the words " apparent possession " in the Act are deprived of meaning. Contrast the dictum of Vaughan Williams J. in *Re Satterthwaite* (1895), 2 Mans. 52, at p. 55.

This decision has been discussed at some considerable length because it has become a leading case, the leading case, in fact, on the law of husband and wife as regards possession of household property. It might have been possible to treat the case as entirely based on the decision that the receipt was not a bill of sale and to consider the rest as *obiter dicta*. This, however, was not done, as appears from the decision of the Court of Appeal in *French* v. *Gething*,[70] rendered in 1922. This was not a case of a sale between husband and wife, but a case of a gift, and, this is important, a gift by deed. In 1914 the husband gave to his wife by deed certain furniture which was in the matrimonial home, without registering the deed as a bill of sale. In 1920 creditors who had obtained a judgment against the husband tried to levy execution against the furniture which was promptly claimed by the wife as her property. There was the usual interpleader issue, and the wife won. In this case there could be no doubt that the deed was a bill of sale and that it was void as against the creditors if the husband continued to be in possession or in apparent possession of the furniture.[71] The case hinged entirely on the question whether he did. The three members of the court, Bankes, Scrutton and Atkin L.JJ., regarded *Ramsay* v. *Margrett* as conclusive. Bankes L.J. took the view that household goods could not be presumed to be in the possession of the husband,[72] and he as well as Scrutton L.J.[73] and —apparently—Atkin L.J.[74] applied Littleton's doctrine. Atkin L.J. emphasised that "if the questions raised are not concluded by the judgments of Lord Esher M.R. and Davey L.J. in that case it is time for this court to declare that the law was correctly laid down by those learned judges."[75] "Where husband and wife are living together in the same house and the husband gives a bill of sale to his wife, not only are the goods in the possession of the wife and no longer in the possession of the husband, they are also in the apparent possession of the wife and no longer in the apparent possession of the husband."[76]

In this case, however, in contrast to *Ramsay* v. *Margrett*, there appeared, in the judgments of Scrutton and Atkin L.JJ., the additional argument that, "at the present day when wives can, and often do, possess as much property as their husbands it is impossible to say which of the two is in possession or apparent possession of the household furniture if nothing more is known than that the parties live together in the house,"[77] and that if both are in possession the Act of 1878 does not apply. "'Possession' and

[70] [1922] 1 K.B. 236.
[71] *Per* Scrutton L.J. at p. 245.
[72] At p. 241.
[73] At pp. 241, 246.
[74] At p. 247.
[75] At p. 246.
[76] At p. 247.
[77] At p. 245.

'apparent possession' mean sole possession and sole reputed ownership." [78]

It is difficult to exaggerate the importance of this decision. With it the Bills of Sale Acts had definitely collapsed as regards transactions between husband and wife, provided only the spouses took the trouble of complying with the necessary formalities, *i.e.*, of making the gift by deed. The separation of property rule had been successfully invoked so as to defeat the creditors. The question had to arise one day whether this extraordinary state of affairs was also allowed to prevail where persons other than husband and wife living in the same household resorted to similar machinations. It is clear that, whatever may be the law as to possession by husband and wife, the mere fact that a person lives in a house, *e.g.*, a guest or a relative or a servant,[79] does not make him or her a possessor or apparent possessor, jointly or otherwise, of the household goods. But what about a couple who, without being married, live together as man and wife and are perhaps reputed to be a married couple, or about father and daughter, or mother and son, sharing a household? Goddard L.J., in *Youngs* v. *Youngs*,[80] thought that the principle of *Ramsay* v. *Margrett* and of *French* v. *Gething* was not based on the existence of a marriage but on the "common establishment" and that it could apply "where a man is living openly with a mistress instead of a wife." In the case itself a man had sold the furniture to his housekeeper, and even if, as the reported facts suggest, she was his mistress, she was held to use the furniture, in so far as she used it at all, in her capacity as a servant. Hence the man was held to have remained in possession or apparent possession of the furniture he had sold to her and for the price of which he had given a receipt which, in the circumstances, constituted a bill of sale. The execution creditor was the man's wife who had petitioned for divorce by reason of her husband's adultery with the claimant and had obtained an order for alimony. The sympathy of the court appears to have been very much on the side of the execution creditor, but it is also possible to discover, at any rate in the judgment of Goddard L.J.,

[78] At p. 247.

[79] See *per* MacKinnon L.J. in *Youngs* v. *Youngs* [1940] 1 K.B. at p. 768, but contrast the case of the mother-in-law: *Antoniadi* v. *Smith* [1901] 2 K.B. 589. (C.A.: Vaughan Williams, A. L. Smith, Stirling L.JJ.)

[80] [1940] 1 K.B. 760, at pp. 769 *et seq.* And similarly "where a mother-in-law and son-in-law, or a mother and son, may be living in the same house, or where two friends may be sharing a common establishment." Goddard L.J. referred to *Antoniadi* v. *Smith*, *supra*, and to the example given by Atkin L.J. in *French* v. *Gething* [1922] 1 K.B. at p. 247 of "three men in a boat" belonging to one of them. If the owner sells it to one of his two visitors, possession passes to the purchaser. It may be doubted whether this illustration is very relevant to the case of husband and wife who share possession as a result of their matrimonial consortium.

a certain lack of enthusiasm for the law as laid down in the earlier cases.[81]

The most recent case, *Hislop* v. *Hislop*,[82] was, like *French* v. *Gething* and unlike *Ramsay* v. *Margrett* and *Youngs* v. *Youngs*, a case of gift and not one of sale. However, the gift was made by simple writing and not by deed, and this distinguished it from *French* v. *Gething*, inasmuch as under the rule in *Cochrane* v. *Moore*[83] property could not have been transferred by gift without deed or delivery. The Court of Appeal held there had been no delivery and decided the case in favour of the execution creditor against the wife of the judgment debtor. At the time when he purported to give her the furniture he was living with her, but they were not yet married. He was still married to his first wife, the execution creditor, who had then started divorce proceedings by reason of the husband's alleged adultery with the claimant. The order the first wife sought to enforce against the furniture was the maintenance order she had obtained in the divorce case, but the difference between the case and *Youngs* v. *Youngs* was, inter alia, that subsequent to the alleged gift and prior to the execution proceedings the husband's first marriage had been dissolved and he had married the claimant. The case is very imperfectly reported and it is necessary to discuss it at some length because it may be of great importance for the future development of the law.

The county court judge[84] to whom *Ramsay* v. *Margrett* had been quoted, but neither *French* v. *Gething* nor *Youngs* v. *Youngs*, thought that on grounds of "public policy" the claimant, having been the owner's mistress at the time of the alleged gift, was not entitled to the "protection" the Court of Appeal had given to Lady Ramsay. Nor did he think that, by reason of the subsequent marriage, "the lack of sympathy of the court ought to have been cured." It is not a little surprising to find that the question whether the creditor enjoys the protection of the Bills of Sale Act and whether the debtor is still in possession of the goods is somehow linked with the matrimonial and sexual habits of the debtor, but it is not without significance that the county court judge regarded *Ramsay* v. *Margrett* as a decision based on a public policy. He may very well have correctly guessed the inarticulate considerations prompting the Court of Appeal in 1894 to lay down a principle by which in effect it countenanced machinations between the spouses withdrawing their furniture from seizure by creditors.

[81] The words: "I loyally accept the decision in *Ramsay* v. *Margrett* and that in *French* v. *Gething*" in [1940] 1 All E.R. at p. 354 are, in [1940] 1 K.B. 769 toned down to: "I fully accept."

[82] [1950] W.N. 124. The writer is indebted to Professor L. C. B. Gower for having drawn his attention to this case, and to Lord Justice Denning for the loan of a shorthand transcript of the judgments.

[83] (1890) 25 Q.B.D. 57 ((C.A.): Lord Esher M.R., Fry and Bowen L.JJ).

[84] The writer is indebted to Messrs. J. H. Milner & Son, solicitors for the first Mrs. Hislop, for the loan of the county court judge's note.

The rule in *Ramsay* v. *Margrett* has served as a substitute for statutory principles [84a] preserving from execution a minimum of household goods required for subsistence. Such a principle if properly formulated by statute, however, would distinguish between those household goods which are needed in order to maintain a modest but decent standard of life from furniture and other articles which are not. *Ramsay* v. *Margrett* would be less objectionable if it did not extend to the mahogany sideboard as much as to the kitchen table. The "hit or miss" method of judicial legislation is frequently far less discriminating than a statutory enactment based on a deliberate social policy.

Although the decision by which the Court of Appeal affirmed the judgment of the county court was founded on a strictly legal analysis, it is possible to detect in the judgments of Evershed M.R. and of Denning L.J. the same lack of judicial sympathy for the attempt made by the second wife to defeat the first wife's claim to enforce her maintenance order against the furniture which had belonged to her own household. Evershed M.R., on a consideration of "the whole subject-matter with which this action is concerned," would have been "certainly very reluctant in a case of this kind to disturb the conclusion of a county court judge, putting it quite briefly that the claim of the second wife to this furniture in defeasance of the rights of the first wife has not been made good." Denning L.J. expressed some doubts concerning the dictum of Goddard L.J. in *Youngs* v. *Youngs*, quoted above. He was "not at present prepared to hold that when a man sells or gives the furniture in a house to a mistress with whom he is there living that he thereby ceases to be in apparent possession of it. It has been held that if he sells or gives the furniture to his housekeeper he still remains in apparent possession of it and his housekeeper cannot set up the document of sale or of gift as against his creditors. It would be strange if an adulterous mistress was allowed to make a claim which an honest housekeeper cannot." The reluctance expressed by the Master of the Rolls was connected with the fact that, in this case, the execution creditor happened to be the debtor's first wife, but Denning L.J. went further. His disinclination to disturb the judgment of the county court judge would have been the same if the creditor had not had the special sympathy of the court. More than that, in his judgment there appears openly that critical attitude towards the rule in *Ramsay* v. *Margrett* which the court in *Youngs* v. *Youngs* seems to have shared without expressing it: "I must accept the law as laid down in *Ramsay* v. *Margrett* and *French* v. *Gething* in regard to husband and wife. Those cases show that a husband may be able to defeat his creditors by giving his furniture by deed to his wife. That is

[84a] The provisions in s. 8 of the Small Debts Act, 1845, are insufficient.

bad enough. I am not prepared for myself to extend this rule to a man and his mistress."

There was, of course, the additional question whether the subsequent marriage between the debtor and the claimant was able to have a "curative" effect, a question which could not have arisen in *Youngs* v. *Youngs*. Supposing the rule in *Ramsay* v. *Margrett* is, contrary to the opinion expressed by Goddard L.J. in *Youngs* v. *Youngs*, based on the "marriage tie" and not on the "common establishment," at what time must the "marriage tie" exist, at the time of the alleged sale or gift or at that of the attempted execution proceedings? Although all that was said on this point in *Hislop* v. *Hislop* was only *obiter dictum*, it is not without interest that, in this matter, there was a difference of opinion in an otherwise unanimous Court of Appeal. The Master of the Rolls left the point open and expressed no view upon it. Denning L.J. did not see why a "defective title should be automatically perfected by subsequent marriage. . . . The apparent possession remained the same both before and after the marriage. It remained in the man. If he wished to take advantage of *Ramsay* v. *Margrett* or *French* v. *Gething* he ought to have made a fresh gift after marriage. But, . . . it is unnecessary to express a concluded opinion on that point. . . ." Jenkins L.J. inclined to the opposite view. He "did not wish to pronounce any decided opinion upon the matter," but it seemed to him "that the moment of time which is relevant for the purpose of determining where the possession, or apparent possession, of property is for the purpose of section 8 of the Act may well be the date at which the adverse claim is made, that is to say, in this case the date of levying the execution. If that were the correct date, it seems to me that there would be much to be said in this case for the view that, inasmuch as the husband and the second wife were married in May, 1947, and thereafter continued to live together in the house containing the furniture, and have done so till this day, and inasmuch as the execution was only levied in 1949, the furniture at the critical date was furniture in a common establishment consisting of the matrimonial home, and therefore furniture with respect to which one could not say that it was in the apparent possession of the husband any more than it was in the apparent possession of the second wife. If that be so, it might have followed, had this transaction been founded on what was in truth a valid and complete gift, that it would not have been possible for the first wife to show that the transaction was invalidated by the Bills of Sale Act, 1878, because she would not have been able to show that the furniture was in the possession, or apparent possession, of the husband, and that, of course, is an essential ingredient for the invalidating of a bill of sale under section 8 of the Act. In other words, I think the case might have been brought within the principle of, for instance, *French* v. *Gething*." What the creditor has to show under section

8 of the Act of 1878 is that the goods "at or after the time of . . . executing such process *and* after the expiration of . . . seven days" after the making or giving of the bill of sale "are in the possession or apparent possession of the person making such bill of sale." It seems to follow that the view tentatively expressed by Jenkins L.J. is only tenable if the marriage occurs within seven days of making the bill of sale. Moreover, and apart from this technical point, is it not slightly odd that a marriage should operate as a conveyance of property from the husband to the wife, automatically and without the parties even being aware of it, because the lady, upon the fateful words being spoken in the church or before the registrar, "appears" to be in "possession" of household goods the joint use of which she may have had for years? Should it not be said that the validity of the bill of sale must exclusively be judged from the moment when it is made? In any event, the very question demonstrates the fantastic unrealities which are involved in the rule of *Ramsay* v. *Margrett*.

That rule was not, of course, abrogated by *Hislop* v. *Hislop*, but it is now in disfavour. More than that, the *ratio decidendi* of *Hislop* v. *Hislop* while precariously compatible with the rule casts the most serious doubt on its validity. That *ratio decidendi*, as indicated above, was that, in the words of Evershed M.R., "unless delivery can be shown, that is to say, either actual or manual delivery, or its equivalent, an attempt by parole to give, that is to say, transfer the title to personal chattels is ineffective." The three members of the court were unanimous on this point, and they were also unanimous on the further point that this rule in *Cochrane* v. *Moore*[85] would have defeated the claimant even if at the time of the alleged gift she had already been the debtor's wife. In other words: the rule in *Ramsay* v. *Margrett* does not help the spouses to frustrate the rights of creditors, unless the transaction between them is either, as in *Ramsay* v. *Margrett*, a sale, or, as in *French* v. *Gething*, a gift in the form of a deed. Why should one be able to say that this principle casts a doubt on *Ramsay* v. *Margrett* itself?

A gift by parole is complete upon delivery. If there is "delivery" of the furniture by the husband to the wife, she becomes the owner, subject to the Bills of Sale Act. On principle delivery is transfer of possession.[86] If we apply the illogical and circular reasoning of *Ramsay* v. *Margrett* to the case of a gift between husband and wife we must say that, possession being doubtful, it follows title, and that, therefore, the wife is in possession from the moment of the gift. Why should a reasoning applicable for the purpose of ascertaining the possessor under section 8 of the Bills of Sale Act, 1878, not also apply for the purpose of ascertaining the possessor under the rule in *Cochrane* v.

[85] *Ubi supra.*
[86] *Pollock and Wright on Possession*, pp. 57 *et seq.*

Moore? The Court of Appeal, in *Hislop* v. *Hislop*, refused so to apply it, rightly, in the writer's submission. But this refusal involved a criticism of *Ramsay* v. *Margrett*, for if the alleged bill of sale does not operate as a transfer of possession for the purpose of perfecting the gift, how can it so operate for the purpose of taking possession out of the maker of the bill of sale for the purpose of the Act? The judgment of the Master of the Rolls, with its cogent demonstration of the "circular argument" used by counsel for the claimant, was in fact a devastating criticism of *Ramsay* v. *Margrett* itself. Nor is all this merely a technical argument based on logic and "parity of reasoning." After all, the rule in *Cochrane* v. *Moore*, whatever be its historical origin, serves the same object of legal policy as the Bills of Sale Acts: to secure a modicum of "visibility" for transfers of property. To have applied Littleton's doctrine to the rule in *Cochrane* v. *Moore* would have frustrated its purpose, but this is exactly the reproach which must be levelled against the rule in *Ramsay* v. *Margrett*.

Enough has been said to show that, until very recently, the courts have failed to realise the need for an adaptation of the law of possession and of personal property to the matrimonial régime introduced by the legislation of 1870, 1882 and 1935. Had they been a little more creative and a little less devoted to the worship of dead letters, had they, after the 1882 statute, acted in the spirit of a Lord Nottingham or a Lord Mansfield, they would have found a way to protect creditors against the shifting of property from husband to wife or from wife to husband. They would not have overlooked the unreality of transfers of property between the spouses and treated them as a unit within which no change in the property situation can be allowed to affect the outside world. When all is said and done, *Ramsay* v. *Margrett* is found in the company of such cases as *Salomon* v. *Salomon & Co.* and other decisions often permitting interested parties to use "corporate entities" to defeat outside creditors, including the revenue authorities. Transfers of household property between spouses who live together may be no less "bogus" than one-man companies and other devices invented for the purpose of evading the law. The whole matter casts a somewhat dubious light on the process of judicial legislation.

The statutory safeguards (outside the Bills of Sale Acts themselves) are scanty and have been largely emasculated. To mention section 172 of the Law of Property Act, 1925, in a connection such as this, is almost to indulge in irony: how many creditors will be able to prove "intent to defraud" in connection with a conveyance between husband and wife? And, if they can, how will they circumnavigate such snags as are shown, *e.g.*, in *Harrods, Ltd.* v. *Stanton*[87]? To be sure, section 42 of the Bankruptcy Act, 1914,

[87] [1923] 1 K.B. 516 (Divisional Court: Bailhache and McCardie JJ.). There a deed of gift made between husband and wife had been declared void under

may in certain cases be a little more promising, but not very much. To start bankruptcy proceedings for the purpose of upsetting a transaction between husband and wife involves a serious risk of throwing good money after bad, and, moreover, very small creditors whose claims do not amount to at least £50 cannot use this machinery at all. In the critical cases it is often easy to prove that the gift or sale between husband and wife was made more than two years before the creditor tries to enforce his claim (as, *e.g.*, in *French* v. *Gething*), and the 10-year clause in subsection 1 can be put out of action if the solvency of the debtor at the time of transfer can be proved which would have been possible, *e.g.*, in *Hislop* v. *Hislop*. Finally, there is the complicated and ill-drafted section 10 of the Married Women's Property Act, 1882,[88] which provides, inter alia, that "nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband." This might have helped the husband's (but not the wife's) creditors. It is, in fact, one of those provisions which give effect to the "unity of the household," and, if one likes, one might call it an English equivalent of the *Praesumptio Muciana*. However, whatever value this enactment might have had, was destroyed by *French* v. *Gething*,[89] the only case, it seems, in which an attempt was made to use it so as to invalidate a gift by the husband to the wife. The clause was obviously drafted with the "reputed ownership" clause of the Bankruptcy Act[90] in mind, although the reference to trade was—deliberately, it seems—omitted. Atkin L.J. was therefore inclined to think[91] that the section might apply to household property, even where the spouses were not living on premises where the husband carried on a trade. Even so, the meaning of the clause remained mysterious, especially,

what is now s. 172. The donee, *i.e.*, the wife, had however granted a bill of sale after the deed had been executed and before it was declared void. The bill of sale holder was in good faith. One of the husband's creditors then attempted to levy execution against the furniture, which was claimed by the holder of the bill of sale. The court held that, at the time when the wife granted the bill of sale, she was the "true owner" of the furniture so that the bill of sale was valid (s. 5 of the Bills of Sale Act, 1882) and its holder protected under the statute 13 Eliz. 1, c. 5 (which has now been replaced by s. 172 of the 1925 Act). Until a deed of gift is set aside under that provision it is valid and the donee is the "true owner."

88 It is quite incomprehensible why the section should apply so as to protect the husband's creditors against gifts to the wife, but not the wife's creditors against gifts to the husband.

89 [1922] 1 K.B. 236.

90 Bankruptcy Act, 1914, s. 38 (*c*): "All goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; . . ." There was a similar clause in the Bankruptcy Act, 1869, s. 15 (5).

91 At p. 249. Bankes L.J. mentioned the point but expressed no opinion (at p. 244).

as Scrutton L.J. pointed out,[92] the juxtaposition of "order and disposition" and of "reputed ownership." The decisive point, however, was that, in the circumstances of *French* v. *Gething*, the husband was held to have lost the power to order and to dispose and that he was not the "reputed owner." "Order and disposition . . . must mean that the husband has the right or the permission of the true owner to dispose of (the goods) . . . or give directions for their removal from one place to the other." [93] Of this there was no evidence. It was difficult to imagine that the husband, having lost the apparent possession, could be said to be the reputed owner of the furniture. This was, for practical purposes, the end of section 10, because the reasoning based on the identification of possession and reputed ownership and the narrow interpretation of "order and disposition" will defeat all attempts to use this provision as a *tabula in naufragio*. In any event, its wording is unfortunate because it seems to imply that the creditor must always be able to rely on a ground for invalidating the transaction outside the Act and the section merely says that the Act itself will not preclude such reliance.

IV

The Family Fund

The burden of the present article is that the principle of separation of property has been misapplied. It has been allowed to override the inferences which the courts should have drawn from the fact that household property, including household savings and household furniture, is *communi usui destinatum*. The dedication of these assets to joint use should have determined their distribution in the event of an end of the consortium and should have been the dominating factor in defining the creditors' rights in the face of an artificial shifting of property rights between the spouses. The unity of the household as a community of life and a community for the purposes of using and consuming commodities, including money, has been neglected by the law, except where the law is compelled to ascertain the degree to which the members of the household maintain each other and are dependent on each other. Here it was impossible to overlook the basic fact that they all contribute to, and are maintained out of, a common fund, and it was impossible to determine the mutual relationship between any two given members of the community except in terms of what the whole community receives and what it spends. In order to see a possible future development of the law we must, therefore, turn away from the law of contract, tort and property, and consider the law of social insurance. To discuss family law without taking

[92] At p. 246.
[93] *Per* Atkin L.J., at p. 249.

into account social security legislation is unrealistic and of little value.

A person may be entitled to basic insurance benefits by reason of the death or incapacity or unemployment of another person, if he is dependent on or maintained by the latter. This principle applied already under the Workmen's Compensation Act.[94] It now applies to the parents[95] of the victim of a fatal industrial accident or disease whose rights differ according as to whether they were " to a substantial extent "[96] or " wholly or mainly " maintained by the deceased.[97] It also applies to the widower of a woman killed in an industrial accident[98] and to certain other relatives,[99] but not to the widow of a deceased man whose rights are defined in a different way.[1] Moreover, a man entitled to basic sickness or unemployment benefit or to a retirement pension obtains an increase of benefit for his wife if he either resides with or is " wholly or mainly maintaining " her,[2] and in certain circumstances this applies to the husband of a woman beneficiary and also to other relatives.[3] These are only examples to show something of the framework within which the National Insurance Commissioner, the Industrial Injuries Commissioner, and their deputy commissioners, *i.e.*, the highest judicial authorities in social insurance law, have developed a body of case law by which they have given effect to, and elaborated in great detail, the principles governing the family fund.[4]

94 Workmen's Compensation Act, 1897, 60 & 61 Vict. c. 37, First Sched. No. 1 (*a*) (i), and s. 7 (2); Workmen's Compensation Act, 1906, 6 Edw. 7, c. 58, First Sched. No. 1 (*a*) (i), and s. 13; Workmen's Compensation Act, 1925, 15 & 16 Geo. 5, s. 2 and s. 4.

95 National Insurance (Industrial Injuries) Act, 1946, s. 22.

96 s. 22 (1), *i.e.*, maintained normally by a contribution of not less than an average of 5s. per week; S.I. 1948, No. 1372, Reg. 21 (3).

97 s. 22 (2), *i.e.*, maintained normally by contributions reaching at least one half of the cost of maintenance: S.I. 1948, No. 1372, Reg. 21 (1) and (2).

98 s. 20.

99 s. 23.

1 s. 19.

2 National Insurance Act, 1946, s. 24 (1), and S.I. 1948, No. 1278, Reg. 5.

3 s. 24 (2).

4 Not all readers of this article may be familiar with the way the Commissioners' decisions are reported. From the coming into force of the National Insurance Acts, *i.e.*, from July 5, 1948, until the end of 1950, the Ministry of National Insurance published " pamphlets " containing decisions of the Commissioners and Deputy Commissioners and of tribunals consisting of a Commissioner and several deputy commissioners formed for the decision of legal questions involving special difficulty. These pamphlets were published in five series: U (unemployment benefit), S (sickness benefit), P (retirement pension), G (guardian's allowance, maternity benefit, widow's benefit and death grant) and I (benefits under the National Insurance (Industrial Injuries) Act). A decision marked " C.S." is thus a case of sickness benefit decided before the end of 1950, an additional letter " S " signifies a Scottish and a " W " a Welsh case. Since January 1, 1951, the decisions have not been published in pamphlet form, but separately, but the five series have remained the same, and each decision is marked " R " with the addition of the letter signifying the series and a number. Thus " R(U) 30/51 " is the thirtieth decision published in the unemployment benefit series in 1951. The Ministry also publishes pamphlets containing selected decisions of the Minister himself on questions of

These principles originated in days long before the coming into force of the present system of social insurance legislation.[5] From the beginning it was clearly understood that dependency is a question of fact and that it is not to be confused with the legal right to be maintained. This was laid down as early as 1900 by the House of Lords in a case [6] arising under the Workmen's Compensation Act, 1897, which was then still in force. A 16-year-old boy had been killed in an industrial accident. He lived with his parents and five brothers and sisters. All the wage-earners in the family contributed their earnings to the maintenance of all, and the deceased got out of that common fund what he needed for himself. The father claimed workmen's compensation, although it was clear that, in the circumstances, he had had no present right to legal maintenance against his son, and he won in his case in the House of Lords. Lord Halsbury L.C.[7] summarised the principles which, though much elaborated and refined in the meantime, have to this day been the guiding rules as regards the family fund :

> "The whole family were dependent upon wages. Whose wages? Partly this boy's wages. It is said that this boy was under no obligation to support his brothers and sisters. No one denies that; but it appears to be forgotten that the obligation is upon the head of the family. . . . The burden being upon the father of the family, the father of the family in his turn obtains from the wages of those who are being maintained by him a partial contribution to the general family fund. Why is not the father in the discharge of that burden partly dependent upon the earnings which he receives from his children? I am not able to answer that question. . . . If it is true that there was in this case a sum of 8s. a week contributed by this boy to the common family fund, it appears to me to be perfectly clear that the father was to some extent 'dependent' upon that son's earnings."

It had been argued that the degree of dependency had to be determined in accordance with an objective standard of living adopted normally by families of the same class in the district. Lord Halsbury would have none of this:

> "What the family was in fact earning, what the family was in fact spending, for the purpose of its maintenance as

classification and insurability. These are marked "M." Finally the Ministry publishes a very useful Index to Commissioners' Decisions which is kept up to date through amendments of which 23 have so far appeared. All these publications can be obtained from H.M. Stationery Office. They are of great interest not only on questions of national insurance but on many other branches of the law.

[5] *i.e.*, they originated in the case law developed by the courts under the Workmen's Compensation Acts and by the Umpire and Deputy Umpires under the National Insurance Act, 1911, and under the Unemployment Insurance Act, 1935. On the provisions under unemployment insurance legislation preceding the present law, see Tillyard, *Unemployment Insurance in Great Britain, 1911–1948*, *passim*.

[6] *Main Colliery Co.* v. *Davies* [1900] A.C. 358.

[7] At pp. 360 *et seq.*

> a family, seems to me to be the only thing which the county court judge should properly regard."

"General family fund," "what the family was earning, what the family was spending"—of course, we are now in the province of factual inferences and not in that of strict rules of law, but coming from the cases on household savings and on gifts between husband and wife, one feels as if a window had been opened to let in the fresh air of common sense.

Ten years later an attack was made on this family fund principle in a case concerning a mining disaster in which a father and two of his sons had been killed.[8] They had lived together with the mother and her surviving children (none of whom earned wages) and the mother as well as these children were held to be entitled to workmen's compensation with regard to all three deaths. Lord Loreburn L.C.,[9] after having pointed out that the earnings of the three deceased formed a "common fund" out of which "the whole household was maintained," warded off the attempt to hamstring the family fund rule by legal fictions; that is, he dealt with the typical lawyer's point that the mother was in the eye of the law wholly dependent on the husband, and could not therefore in any degree be dependent on the sons, an argument which had in the first place been presented as an "inexorable rule" of law and in the second as a rebuttable presumption:

> "I am told that I am by law required to affirm something as the truth which everyone knows to be entirely false. The short answer is that the law requires no such thing. There are such things as legal fictions, which have a peculiar history of their own, but this is not one of them. The mother was not, in law, wholly dependent on her deceased husband. She and her family were dependent on those who supplied them with the means of subsistence, namely, in the present case, her husband and each of her two deceased sons."

Lord Macnaghten[10] and Lord Shaw of Dunfermline[11] dealt more explicitly with the principle adopted by the Court of Appeal (and which had been justified with the words of Lord Halsbury in the previous case) "that you must shut your eyes to the contributions from which the family maintenance comes; that you must look to the father and to the father alone; and that what he spends on the maintenance of the family must be deemed to be his in fact because it may be his in law." This view was decisively rejected by the House of Lords. The attempt to dissolve the family unit and the unit of its fund by looking at the relations between the members individualistically was condemned by the House of Lords, as well as the substitution of categories of legal entitlement for

[8] *Hodgson* v. *West Stanley Colliery* [1910] A.C. 229.
[9] At p. 232.
[10] At p. 236.
[11] At p. 240.

those of the factual origin and destination of the funds. The contrast to the household savings cases is striking indeed.

The limitations of the family fund rule were demonstrated by a decision of the Court of Appeal of 1916.[12] There the wife's father had, for five years, been a member of the household which consisted of himself, his son-in-law and daughter and their five children. He had contributed 13s. a week to the household expenses, while his son-in-law contributed 23s., and this 36s. left a surplus of 3s. a week which the daughter saved. The court held that the daughter was not "dependent" on her father so as to be able to claim workmen's compensation after his death in an industrial accident. Phillimore L.J.[13] treated the relation as one of contract between the father and the husband represented by the wife as his agent so that the loss of the surplus was that of the husband alone. It is very doubtful whether the case would be decided the same way if it came before the Commissioner today.

The principle of the family fund was adopted by the Umpire under the Unemployment Insurance Acts[14] and by the Commissioners after the coming into force of the present National Insurance Acts. In the autumn of 1949, about 15 months after the coming into force of the Acts, the Injuries Commissioner reaffirmed the principle[15] in the face of an argument that it had lost its force as a result of section 42 of the National Assistance Act, 1948, which had considerably restricted the scope of legal family maintenance obligations. In this fundamental decision the Commissioner reiterated the basic idea already expressed in the House of Lords decisions mentioned above:

> "There is no indication . . . in the provisions of the National Insurance (Industrial Injuries) Act, 1946, relating to questions of maintenance . . . that the inference resulting from the actual facts of maintenance was to be qualified in respect of legal liability to maintain—under statute or otherwise. Nor in relation to this case in particular and the consideration of maintenance questions generally arising for decision under the National Insurance Acts, 1946, have Commissioners' decisions encouraged the application of any method for calculating contributions and maintenance other than the family fund method, and—unless and until some method likely to give fairer and more satisfactory results is suggested and approved—any departure from the procedure in operation hitherto is obviously to be avoided as likely to lead to confusion."

[12] *Montgomery* v. *Blows* [1916] 1 K.B. 899 (Lord Cozens-Hardy M.R., Phillimore L.J., Sargant J.)

[13] At pp. 903 *et seq.*

[14] The leading case No. 18381/31, Unemployment Insurance Code 8B, p. 187, is quoted in C.I. 111/50, Pamphlet I/18, pp. 12 *et seq.*

[15] C.S.I. 50/49, Pamphlet I/12, pp. 2 *et seq.* (October 7, 1949).

This case and other cases [16] show what in detail is involved in that method. It is far from being vague, but it is not based on a rule of law. It rests on a number of factual inferences drawn from experience. Where the number of members of a household is known and where the contributions of each member to the upkeep of the family can be ascertained, the arithmetical figure signifying the dependency of any given member of the household on each other member can be found by means of a calculation. But where, as in a case decided on June 27, 1952,[17] the facts before the Commissioner do not permit a family fund calculation, a common-sense inference is drawn from such facts as are known, and the family fund principle is thus saved from the danger of becoming a rigid rule working injustice in cases it does not fit.

In order to ascertain the family fund, one must add up the contributions made by all the members of the household, whether they are made in cash or—as, *e.g.*, in the case of a miner's "free coal"—in kind.[18] What a household member receives by way of insurance benefit or assistance grant [19] is included in his or her contribution, and, while a woman's retirement pension in virtue

[16] C.S. 547/49, Pamphlet S/12, pp. 4 *et seq.*, concerning a family consisting of a widow and her three sons; C.S. 52/50, Pamphlet S/17, pp. 3 *et seq.*, showing that (both on the assets and the liabilities side) the family fund must be calculated with reference to the situation prior to the event which gives rise to the insurance claim, and also showing that where the husband, as a result of his occupation, normally lives outside the house, his contributions form part of the family fund as contributed by him on the assets side, but he does not appear on the liability side; C.P. 96/50, Pamphlet P/14, which decides that a retirement pension enjoyed by a woman in virtue of her husband's insurance is his and not her contribution to the family fund; C.I. 266/50, Pamphlet I/22, pp. 11 *et seq.*, where it was held that not only insurance benefits but also assistance grants must be included in the family fund, despite their discretionary character; R(S) 22/52 to the effect that if a married woman receives an assistance grant, this is her and not her husband's contribution to the family fund; *e.g.*, C.S. 547/49, Pamphlet S/12, pp. 4 *et seq.*; C.S. 52/50, Pamphlet S/17, pp. 3 *et seq.*; R(S) 1/51 (showing the rule as applied in a case of temporary separation of husband and wife).

[17] R(I) 46/52. A widow, 89 years old, was held to have been "to a substantial extent" maintained by her 55-year old son, a bachelor, who shared the same household with his mother and a brother and the latter's four children, all under school-leaving age. The bachelor son had been killed in an industrial accident and it was impossible to ascertain how much of his earnings he had contributed to the household.

[18] C.I. 111/50, Pamphlet I/18, pp. 12 *et seq.* The contribution in kind is assessed at the retail prices prevailing in the area in which the claimant resides. See also C.I. 33/49, where the wife was, with the children, living apart from her husband in a house standing in the joint names of husband and wife, the deposit having been contributed by both in equal shares. He paid the entire amount of 10s. a week owing to the building society for interest and sinking fund on the mortgage. The entire amount of 10s. as well as his contribution to the rates was treated as his contribution to the family fund. "She enjoyed the beneficial occupation of the house. He would have been entitled to recover from his wife by reason of her joint tenancy in equity half that amount, that is to say 5s. a week. Further, he allowed her to have the benefit of his half share by occupying it and I think in all the circumstances it is just as if he rented the house on her behalf."

[19] C.I. 266/50, Pamphlet I/22, pp. 11 *et seq.* The fact that there is a legal right to insurance benefits while assistance grants are discretionary, is irrelevant.

of her husband's insurance is his contribution and not hers,[20] any assistance grant she receives must be treated as her contribution and not his.[21] An absentee member of the household, *e.g.*, a sailor who spends only his leave with the family,[22] may be a contributing member all the same, though he is not normally maintained out of the family fund, so that money he sends to his wife and which she uses for the family is his contribution to the household fund. What one may call a rule of "subrogation" applies to the family fund so that, *e.g.*, the proceeds of a house standing in the wife's name but originally bought out of money supplied by the husband are his contribution.[23] All these rules apply to a household consisting of a man and a woman with whom he lives without having married her.[24]

It will be seen that the contributions of a household member are included irrespective of whether he was legally liable to make them. Thus, in a family consisting entirely of brothers and sisters, their contributions would constitute a family fund, although none of them is legally liable to maintain the other. This rule that you must look at what has happened and not at what the law says ought to happen must not be applied so as to ignore the moral obligations which are the basis of family life. Thus where a member of the family deliberately refrains from contributing his income up to the amount it costs to maintain him, he must allow himself to be treated as if he had contributed the full costs of his own maintenance and he cannot claim to have been dependent on others only because he refrained from maintaining himself. This applies irrespective of whether he spent the money on drink, tobacco or betting or whether he saved it, except where he used the money towards the satisfaction of a legal obligation incumbent

[20] C.P. 96/50, Pamphlet P/14. *Aliter*, of course, if she has a retirement pension in virtue of her own insurance. The important point is that what counts is not who has the legal right to the payments, but who made the contributions which are their basis.

[21] R(S) 22/52. "He contends that it is he, as the head of the family, who receives the assistance grant, since he is legally liable to maintain his wife. . . . The fact is however that the National Assistance grant is a contribution by some one outside the family towards the maintenance of certain members of the family."

[22] C.S. 52/50, Pamphlet S/17, pp. 3 *et seq.* If husband and wife live apart and he makes payments under a court order towards the maintenance of his wife and her children, the payments to the children are not treated as part of his maintenance payments to his wife, but the payments are allocated between the wife and the children in accordance with the court order: C.I. 33/49, Pamphlet I/5, pp. 1 *et seq.*; C.U. 544/50, Pamphlet U/20. In this respect the courts (*Stevens* v. *Tirard* [1939] 2 K.B. 410) adopt a different attitude by holding that no legal or equitable right vests in the children. This is because insurance law looks at the purpose of the payments, not at the legal right. Similarly what one member of the family spends for another, *e.g.*, the husband supplying his wife (who is in hospital) with comforts, is contribution to the latter's maintenance. What matters is not who spends the money but for whom it is spent: R(S) 10/51.

[23] R(S) 6/52.

[24] C.S. 55/49, Pamphlet S/5, pp. 5 *et seq.*

on him, *e.g.*, for the payment of premiums under an insurance contract.[25]

Once the family fund has been ascertained by means of these and other rules, the so-called "unit cost," *i.e.*, the amount the family spends on the upkeep of each of its members, can be found by dividing the total fund by the number of family members, two children being treated as the equivalent of one adult. If each member of the family contributes amounts equal to "unit cost," no member in that family is dependent on or maintained by any other member, but this is, of course, a rare exception. Normally there is a "deficiency," *i.e.*, some members of the household contribute nothing or less than the "unit cost." This "deficiency" which marks the total amount of "maintenance" within that family is found by adding up the unit costs of all members who contribute less than unit cost and deducting what they contribute. On the other hand, in order to find out to what extent a "maintaining" member contributes to the deficiency, all one has to do is to deduct the unit cost from the amount of his actual contribution, *i.e.*, to find out how much of what he pays in is spent for purposes other than maintaining himself.

In practice it is not sufficient to establish the fact that a given member of a family is dependent on or maintained by another member. In view of the provisions in the insurance legislation, some of which have been mentioned above, it is necessary to calculate the exact amount by which a given member is maintained by another member of the family. If, *e.g.*, one seeks to ascertain to what extent a married woman is dependent on her husband, one must first calculate the sum she receives out of the family fund. If she has no income of her own, this will be equal to unit cost; if she is gainfully occupied or has other income, it will be the amount of unit cost less what she contributes to the family fund. It does not follow, of course, that all she thus receives out of the fund comes from her husband (part of it may be contributed by a son) or that all the husband contributes goes to the wife (part of it may go to children still at school). The exact amount signifying the extent to which she is maintained by her husband is found by multiplying what she receives out of the fund (over and above her own contribution) with what he contributes to the "deficiency" and dividing the product by the total "deficiency."

This can be illustrated by means of a simple hypothetical example. If in a family consisting of five adults, father F, mother

[25] Laid down in the fundamental decision C.I. 111/50, Pamphlet I/18, pp. 22 *et seq.* This principle, like all other principles governing the family fund, must be applied with reference to the situation prior to the event giving rise to the claim (C.S. 52/50, Pamphlet S/17, pp. 3 *et seq.*). Note that unlike the law under the Fatal Accidents Acts, an expectation of future maintenance (*e.g.*, in the case of parents claiming with regard to the death of a son killed in an industrial accident) is irrelevant: C.I. 38/50, Pamphlet I/16, pp. 22 *et seq*; R(I) 19/51.

M, and sons A, B and C, F contributes £6, M nil, A £5, B £3 and C £1 per week, the family fund is £15 and the unit cost £3. F and A are contributing members, M and C are maintained members, and B is neither. The deficiency is the cost of maintaining M and C, *i.e.*, twice the unit cost, minus the £1 contributed by C, *i.e.*, £5. To this F contributes £3 and A £2. M is maintained to the amount of £3 (the unit cost), of which F contributes three-fifths, *i.e.*, 36s., and A two-fifths, *i.e.*, 24s. C is maintained to the amount of £2, of which F contributes 24s. and A 16s. The wife is thus, in this family, "mainly" maintained by her husband, and "to a substantial extent," but not "mainly," maintained by her son A.

The principles underlying the decisions of the Commissioners on the family fund are based on an approach towards family property which should be seriously considered in the event of a legislative regulation of the problems discussed in this paper. They cannot, of course, be slavishly applied to the determination of property rights in household goods and household savings, but they are relevant inasmuch as they give effect to the consideration that what the family uses for its upkeep is earmarked for a joint purpose and forms a common fund. In so far the family fund principle is more realistic and more just than the attitude shown by the courts in the household savings and in the household furniture cases. What the husband gives to his wife as a household allowance he pays her in satisfaction of his obligation of maintenance, and the payments should, therefore, be regarded as "earmarked" towards that satisfaction, no matter whether the purpose for which the payment was made is fulfilled immediately by spending or whether its fulfilment is postponed by saving. Household savings ought to be considered as deferred expenditure. He should not be allowed to alienate from its purpose money paid in performance of his obligation by claiming as his own that which is not required for the satisfaction of present but may be for that of future needs. It should be regarded as joint property, and be so treated in the event of a dissolution of the consortium by divorce or separation, while it is just that, in a case of intestacy, it should, within reasonable limits, go to the wife. As regards the outside world, and in particular, the creditors of either spouse, all that belongs to the household, whether furniture or cash or a savings account, should be regarded as joint property available for the satisfaction of the debts of either, subject to certain property indispensable for a modest but decent standard of living being withdrawn from execution altogether. Domestic arrangements between husband and wife as regards their property rights in household goods and savings should be valid as between them provided they can be proved by clear evidence, but they should not be allowed to affect the rights of outsiders.

It is, of course, one thing to formulate in a dogmatic and perhaps over-confident manner a legislative programme like the one

outlined in the preceding paragraph and quite another to carry it into effect. The difficulties are immense. For one thing, some formula will have to be found so as to define "household property" and to distinguish it from investment property which, in the writer's submission, ought to remain separate. The definition of "personal chattels" in the Administration of Estates Act [26] may be helpful up to a point, but may in some respects be too narrow, in others too wide. The solution adopted by French law was well fitted to serve the needs of a society like that of France under Napoleon, *i.e.*, of a mainly agricultural society consisting largely of farmers and of smallholders. There it may have been the right thing to identify investment with land and to lay down that, in the absence of a marriage contract, land owned by either spouse at the time of the marriage should be separate, but that all movable property (whenever acquired) and all land acquired during the marriage (except by inheritance or gift) should be joint property.[27] Such a rule would not be adequate for the requirements of a society in which investment in movable property is at least as important as investment in land. It is, however, arguable that we should hesitate to treat as joint household property the matrimonial home which, though certainly serving the present needs of the family, is likely to be also an investment, more so than movable household goods.

To translate into the language of legislation the ideas submitted in this paper will be a formidable task. Words like "household assets" or "investments" have a connotation for the economist or sociologist whose interest is concentrated on typical situations. The lawyer, whether he acts as legislative draftsman, as judge or as advocate, must always think in terms of marginal problems. The present writer does not claim to have offered a solution. All he intends to do is to demonstrate the need for giving serious consideration to the idea of joint property and to warn against the introduction of new rigid rules such as that of the "housewife's salary" which has been advocated in some quarters. The present law is at variance with the *mores* of the people and with the requirements of justice. Technical difficulties should not be allowed to stand in the way of reform.

O. Kahn-Freund *

(Concluded)

[26] See above, note (44).
[27] Code Civil, Art. 1401, 1402.
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CONDITIONS, WARRANTIES AND DESCRIPTIONS OF QUALITY IN SALE OF GOODS—II

(*Continued from* Vol. 15, p. 445)

8. Sale By Description and Specific Goods. One advantage [1] of the theory of sale by description was the limitation of the doctrine in *Street* v. *Blay* (1831).[2] But it also created a very technical distinction, *i.e.*, the distinction between the sale by description and the sale of specific goods. We must first discuss the relevant difficulties in connection with the Sale of Goods Act; and subsequently discuss more recent developments under the rubric of *Varley* v. *Whipp*.

There is no doubt that the Sale of Goods Act distinguishes between the sale by description and that of specific goods.[4] In the first place, section 13 begins with the words: "Where there is a contract for the sale of goods by description," which obviously implies the existence of other types of sales. In the second place, section 11 (1) (*c*) denies the right of rejection "where the contract is for specific goods." The preliminary question then is, what are "specific goods"? They are goods, answers the Act, which are "identified and agreed upon at the time a contract of sale is made." [5] Nevertheless, Chalmers points out [6] that this definition is only a prima facie one; and he gives the example of the 100 dozen bottles of champagne specifically described as stored in the seller's cellar, of which the buyer buys only 20 dozen. The property in the wine does not pass until the 20 dozen bottles are appropriated to the contract, but if the *whole* cellar is destroyed the seller is discharged from his obligation. Thus, "[for] some purposes this would perhaps be regarded as a contract for specific goods, while for other purposes it would be regarded as a contract for the sale of unascertained goods." [7]

In other words the meaning of specific goods was extended for the purposes of the law of impossibility of performance [8] and the

[1] *Cf.* § 6, *supra.*
[2] 2 B. & Ad. 456; for a full discussion, see § 5, *supra.*
[3] § 9, *infra.*
[4] See also Salmond J. in *Taylor* v. *Combined Buyers, Ltd.* (1924) N.Z.L.R. 627, at 633.
[5] s. 62 (1).
[6] Chalmers, *Sale of Goods* (12th ed.), 174.
[7] *Ibid.* This is, of course, a reference to *Howell* v. *Coupland* (1876) 1 Q.B.D. 258; 46 L.J.Q.B. 147, in which case, it will be remembered, the seller sold 200 tons of potatoes grown in a specific field. The whole crop failed and the seller was excused from delivery. Although the potatoes were unascertained, they were regarded as specific goods, being sufficiently identified.
[8] *Cf.* a discussion of these problems, Glanville L. Williams, *Law Reform (Frustrated Contracts) Act, 1943*, 82-90 (1944).

statutory definition thus became rather indeterminate. As a consequence, the concept of sale by description remained in a state of considerable uncertainty: not only because the draftsman failed to define it clearly, but also because it became more or less impossible to gauge the precise limits of the concept in view of the almost equally fluctuating meaning of the term "specific goods." In brief, it became impossible to say where exactly the sale by description ended and the sale of specific goods began.

Furthermore, it will also be apparent that, as regards section 11 (1) (*c*), the draftsman purported to codify not only the doctrine in *Street* v. *Blay*, but also Blackburn J.'s enunciation of the law in the case of *Heyworth* v. *Hutchinson* (1867).[9] In that case the defendant bought 400-odd bales of wool to arrive "ex ship *Seige*." The wool was guaranteed "about similar to samples," but later proved of rather different quality and the buyer refused to accept it. A strong court held that this was a sale of specific goods—the bags of wool being (apparently) ascertained and the ship identified—and that, therefore, the guarantee gave only a right to damages and not to a right of rejection. And Blackburn J. (as he then was) said: "The wools are guaranteed about similar to samples. Now, such a clause may be a simple guarantee or warranty, or it may be a condition. Generally speaking, when the contract is to *any* goods, such a clause is a condition going to the essence of the contract; but when the contract is as to specific goods, the clause is only collateral to the contract, or is the subject of a cross-action, or a matter in reduction of damages." [10]

However, the precise implications of this decision are quite confusing. Indeed, if the decision in *Heyworth* v. *Hutchinson* is correct, then most of the leading "description cases" [11] can only be regarded as wrong decisions. For in *Gardiner* v. *Gray* (1815) [12] and *Wieler* v. *Schilizzi* (1856),[13] *Jones* v. *Just* (1867) [14] and *Azémar* v. *Casella* (1867),[15] the goods were certainly existing and identified and were, therefore, as specific and determined as those in *Heyworth* v. *Hutchinson*. Nevertheless, all the former cases either decided, or at any rate were based on the assumption, that the buyer could reject the goods. Furthermore, if the distinction is correct it must also apply to the situation where the buyer inspects existing and ascertained goods; in other words, it must apply to the facts in *Josling* v. *Kingsford* (1863).[16] Some subtle difference may perhaps be found between *Heyworth* v. *Hutchinson* on the

[9] (1867) L.R. 2 Q.B. 447; 36 L.J.Q.B. 270.
[10] L.R. 2 Q.B. 447, at 451.
[11] See § 6, *supra*.
[12] 4 Camp. 144.
[13] 17 C.B. 619; 25 L.J.C.P. 89.
[14] L.R. 3 Q.B. 197; 37 L.J.Q.B. 89.
[15] L.R. 2 C.P. 677.
[16] C.B.(N.S.) 447; 32 L.J.C.P. 94.

one hand and the cases just referred to on the other, in an attempt to bring all these decisions within the four walls of reconciliation.[17] But even such a reconciliation would not clear away another, and still more important, contradiction. Although title does not pass unless the goods are ascertained and appropriated to the contract, this appropriation must necessarily take place before the goods can be delivered. Yet if title passes (and indeed must pass) as soon as delivery is set in motion, why should the buyer still be entitled to reject even if originally the goods being unascertained the sale was executory.[18] For the distinction between specific and "described" goods was not merely a distinction between identified and non-identified goods, but was regarded as depending upon whether property or title had passed or not. And Blackburn,[19] at any rate, seems to have been of the opinion that the buyer lost his right of rejection in every case where the property had passed to him.[20]

The upshot is that *Heyworth* v. *Hutchinson*[21] constitutes an important extension of the doctrine in *Street* v. *Blay*.[22] While the latter seems to have been confined to executed bargains and sales, the non-rejection rule now applied even to executory sales. And by making this extension, *Heyworth* v. *Hutchinson* in effect made nonsense of the very distinction (*i.e.*, the distinction between the sale of specific goods and sale by description) which it purported to enshrine.[23]

This whole problem, however, was never squarely faced in the nineteenth-century common law and the result was an extraordinary confusion of basic theory. The situation became critical when the Sale of Goods Act was drafted. For not only did Chalmers incorporate *Heyworth* v. *Hutchinson* in section 11 (1) (*c*), but he also incorporated *Josling* v. *Kingsford*[24] and *Nichol* v. *Godts*[25] in section 13 of the Act, thus codifying two very different and inconsistent lines of principle. Furthermore, he refrained

[17] Thus it is said in Blackburn, *op. cit.* at 542, that the fact that in *Heyworth* v. *Hutchinson* arbitrators had previously decided that the buyer should not be entitled to reject, but only to damages, "may have had some weight"; but it is also pointed out that it "is somewhat difficult to reconcile" the *Heyworth Case* with *Toulmin* v. *Hedley* (1845) 2 C. & K. 157, where in a very similar situation rejection was allowed.

[18] It is precisely this argument which was advanced by counsel in *Bannerman* v. *White* (1861) 10 C.B.(N.S.) 844; the decision is discussed, § 12, *infra*.

[19] Blackburn, *op cit.*, 534.

[20] Benjamin, however, consistently argued that even though the goods were specific, but the sale was executory, the sale should be regarded as one by description and rejection should be allowed; see Benjamin, *op. cit.*, 5th ed., 1908, at 998. This argument seems to have been omitted altogether in the latest editions of Benjamin's work. *Cf.* also *Re Green and Balfour* (1890) 63 L.T. 97, at 99, 100.

[21] (1867) L.R. 2 Q.B. 447.

[22] (1831) 2 B. & Ad. 456.

[23] See also § 7, *supra*.

[24] (1863) 13 C.B.(N.S.) 447; 32 L.J.C.P. 94.

[25] (1854) 10 Exch. 191; 23 L.J.Ex. 314.

from defining "sale by description," yet restricted the seller's obligation to supply merchantable goods to goods sold "by description." As far as specific goods were concerned, they were to conform to a "particular purpose," provided such purpose was indicated by the buyer. The practical effect of this was to exclude all normal and everyday shop sales from the operation of the Act. Thus a buyer buying an article over a counter had not only no right of rejection, but could not even recover damages for a latent defect—unless the seller had given an express warranty or (no less improbable) the buyer had expressed his particular purpose. In brief, the rule of *caveat emptor* returned and triumphed with a vengeance with regard to those transactions where its exclusion would have been both beneficial and important.

There is only one explanation for this peculiar drafting. Although Chalmers had apparently "digested" all available decisions, he failed to see their internal contradictions; and instead of eliminating the accumulated dead wood, he gave statutory recognition to a confused and inconsistent legal pattern. In particular, he was labouring under two important misconceptions. As is shown by his annotation,[26] he could not escape the hegemony of *Barr* v. *Gibson* (1838) [27] and he entertained the notion that only where the goods were sold by description could a duty of merchantability be imposed.[28] Secondly, he was overwhelmed by the idea that the warranty was but a special or express or "collateral" agreement applicable only to specific goods.[29]

However this may be, the law gradually freed itself from some of these absurd restrictions and placed the shop-sale outside the scope of *caveat emptor*. The way in which this was done constitutes an interesting and even amusing chapter of judicial legislation to which we must now turn.

9. Varley *v.* Whipp and its Extensions. With the decision in *Varley* v. *Whipp* [30] in 1920 there opens a rather novel chapter in the history of the English law of sales. For whatever "sale by description" may previously have meant—and, as we have seen, its meaning was quite unsettled—the fact at least that it had been left undefined provided the basis for quite a new development. In *Varley* v. *Whipp* the facts were as follows: the defendant agreed to buy a reaping machine which he had never seen, but which the plaintiff stated to have been "new the previous year" and very little used. When the reaper was delivered, the buyer shortly afterwards discovered that the machine was neither new nor little

[26] Chalmers, *op. cit.*, 60.
[27] 3 M. & W. 390; see § 4, *supra*.
[28] Much of the responsibility for this notion must also lie with Brett L.J.'s judgment in *Randall* v. *Newsom* (1877) 2 Q.B.D. 102.
[29] See § § 3, 4 and 6, *supra*. For Chalmers' misconception as to the distinction between "warranty" and "condition," see § 10, *infra*.
[30] 1 Q.B. 513; 69 L.J.Q.B. 513.

used, and, after some correspondence, returned it to the plaintiff. The latter then brought an action to recover the price, and it was argued on his behalf that there had been a sale of a specific chattel, the machine being identified and agreed upon, so that property having passed immediately the buyer had also lost his right of rejection. The court, however, did not accept this argument.

"All these statements," said Channell J.,[31] "were made with regard to the machine, and we have to consider how much of these statements was identification and how much was collateral warranty. If a man says that he will sell the black horse in the last stall in the stable, and the stable is empty, and there is no horse in it, but only a cow, no property could pass. Again, if he says he will sell a four-year-old horse in the last stall, and there is a horse in the stall, but it is not a four-year-old, the property would not pass. But if he says he will sell a four-year-old, and there is a four-year-old horse in the stall, and he says that the horse is sound, this last statement would only be a collateral warranty. The term 'sale of goods by description' must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone. It applies in a case like the present, where the buyer has never seen the article sold, but has bought by the description." And since, as the learned judge held, this was a sale by description within the meaning of section 13 of the Act, the "implied condition" that the machine should correspond with the description prevented it also from being an "unconditional contract for the sale of specific goods" within the meaning of section 17.[32] In short, the application of section 13 made this a "conditional sale,"[33] so that the property did not pass and the buyer could reject the machine.

Both the result and the reasoning in this decision are remarkable indeed. First, as regards the result, it seems to overrule at least one older decision[34] as well as much that was previously taken to be law.[35] This, however, was certainly no misfortune, for it, in effect, only further limited the pernicious effects of the doctrine in *Street* v. *Blay*.[36] Secondly, as to the reasoning. Observe, to begin with, the tests which the learned judge applied in deciding whether the seller's statements amounted to a warranty or not. For he distinguished two cases: (1) where the seller sells a "four-year-old horse in the last stall," and (2) where he sells a "four-

[31] 1 Q.B. at 516.
[32] *Ibid.*, at 517.
[33] It may be pointed out that there was, on the facts of this case, a "conditional sale" also in another sense. The seller had first to acquire the machine from a third party, so that even though the chattel was specific the sale was executory because the seller had no property in the chattel. Nevertheless, Channell J. did not consider this particular point as relevant to his reasoning.
[34] *Parsons* v. *Sexton* (1847) 4 C.B. 899; *cf. Benjamin on Sale* (8th ed.) 614.
[35] § 8, *supra*. The decision, however, accords with Benjamin's views as to executory sales; see *op. cit.*, 610.
[36] § 5, *supra*.

year-old horse in the last stall" and then warrants it to be sound. It is true that the warranty in (2) is collateral, but it is so only in form or verbal sequence. Suppose the seller says: "I sell you a four-year-old *and* sound horse, etc.," would in this statement the word "sound" be still regarded as a collateral warranty? Applying Channell J.'s distinction the answer is that "sound" would in the last statement not be a warranty, because not collateral in form, and would therefore go to identification. The next question then is: why are the words "four-year-old" treated as identification? For, surely, the horse was sufficiently identified by the statement "the horse in the last stall," and the identification merely depended upon the fact whether there was one horse in the last stall or not. If there was no horse, the identification referred to nothing; if there were two or 10 horses the identification was indefinite; but since *ex hypothesi* there was one horse in the last stall, and one horse only, the identification was definite enough whether the horse was four years old, sound, lame or anything else. Having made this remarkable distinction between "identification" and a warranty collateral in form, the learned judge pointed out that "in all cases" where the buyer has not seen the chattel but relies on the description of it, the sale is one by description. This involves the proposition that where a buyer buys (i) a "sound horse" and (ii) a horse warranted sound, he "relies" on the soundness only in (i) but not in (ii). Furthermore, the reasoning with regard to the horse must also apply to the reaping machine. For once the machine had been identified as "the second-hand reaping machine at Upton," the seller then adding that it was practically new and little used (as in fact seems to have happened in *Varley* v. *Whipp* [37]), the words "new" and "little used" should similarly have been treated as collateral warranties.

And observe another point. The learned judge said that where the seller sells "a four-year-old horse in the last stall," and the horse is not four years old, property will not pass. But why should property not pass? Not because the horse was not "specific," but because the sale was not unconditional, since the sale being by description it was a conditional sale within the meaning of section 17. But such a construction of the Act is, it is respectfully submitted, not in accord with the provision in section 11 (1) (*c*). For the latter provision expressly states that in the case of a specific chattel in which property has passed, the condition in (say) section 13 can only be treated as a "warranty." It may perhaps be argued that property did not pass precisely because of the operation of section 13; hence section 11 (1) (*c*) could not apply. Yet if this construction is accepted, then section 11 (1) (c) would obviously become quite meaningless. The

[37] See [1900] 1 Q.B. at 514.

reason is that any condition (contained in sections 13, 14 and 15) would make the sale conditional, whether the goods are specific or not. Again, even if this construction is confined to sales "by description," the latter term (as we shall hereafter see) is now given a rather wider meaning, including often the sale of specific goods. In other words, the sale would become conditional more often than not, and section 11 (1) (*c*) would practically never apply. This, however, could certainly not have been the intention of the draftsman.[38] Moreover, the conditions in sections 13, 14 and 15 cannot make the sale "conditional" within the meaning of section 17. The former conditions imply obligations with regard to the quality of the goods; the condition of section 17 refers to facts or events which control the passing of property and risk. The rules, however, concerning the passing of property do not depend upon the quality of the goods, but only upon the fact, broadly speaking, whether the goods are ascertained (or appropriated to the contract) or not.[39] Indeed, if the draftsman had intended to give the "quality" conditions the broad effect that Channell J. gave them, he would have said so in more explicit and more definite terms.

These technical remarks, however, are not meant as a derogatory criticism of *Varley* v. *Whipp*, which was clearly a desirable decision. Their purpose is to emphasise what an important departure the decision represents.[40]

Yet *Varley* v. *Whipp* was only half the battle, for sale by description was still confined to the sale of goods which the buyer had not seen. It had to be extended since the concept of "sale by description" (and, because of its wording, also section 14 (2)) would otherwise have remained inapplicable to the vast majority of situations where buyers buy goods in shops, or drinks in public-houses, all of which goods are seen and specific. Although this extension proceeded in general quite smoothly, no less a judge than Vaughan Williams L.J. issued a final *cri de coeur*. In *Wren* v. *Holt* (1903)[41] he expressed the doubt whether a sale over a counter could properly be regarded as a sale by description —"taking the accepted view of lawyers as to the meaning to be attached to the words 'by description' as applied to a sale." The

[38] Benjamin, *op. cit.*, 562, states that "clause (*c*), . . . evidently intended to enact" the old law as to bargain and sales as to specific goods, precluding the right of rejection.

[39] This view is strengthened by the fact that s. 11 (1) (*c*) refers to property which *has* passed to the buyer.

[40] Thus Salmond J. in *Taylor* v. *Combined Buyers, Ltd.* (1924) N.Z.L.R. 627, at 649, seems to have thought that the provision in s. 11 (1) (*c*) "must be read as limited to cases in which the property has passed to the buyer notwithstanding the breach of condition, in consequence of waiver, or acceptance, or otherwise *ex post facto*." It is, however, respectfully submitted that such cannot be the construction of the Act, but is merely the effect of the decision in *Varley* v. *Whipp*.

[41] 1 K.B. 610, at 615. The other learned L.JJ. did not share this doubt.

plaintiff had gone into a beer-house, which he knew to be tied to certain brewers, had asked for a certain kind of beer (" Stanton's beer ") and was supplied with a bottle that was contaminated with arsenic. Not only was this a sale under a trade name, but the jury had also found that the buyer had not relied on the seller's skill or judgment. The court had no option but to apply section 14 (2) or let the seller go scot-free.[42]

The " accepted view of lawyers " as to the meaning of " sale by description " also had another effect, which is not usually appreciated. The effect was that in the earlier cases after the Sale of Goods Act, subsection (1) rather than subsection (2) of section 14 was pressed into service.

Thus in *Wallis* v. *Russell*[43] a girl bought at a fishmonger's two nice fresh crabs for tea. " The buyer here," said Fitzgibbon L.J. in the Irish Court of Appeal, " expressly made known to the seller that the crabs were required for her own eating on the evening of the sale. . . . Was the purpose thus made known a ' particular purpose ' within the meaning of the Act ? . . . I find it impossible to exclude any purpose which is ' made known to the seller.' "[44] Similarly, in *Preist* v. *Last*,[45] the plaintiff bought a hot-water bottle " for a special case " (which, however, he did not explain). After five days' use the bottle burst and scalded the plaintiff's wife. It was held by the Court of Appeal that a hot-water bottle had to be fit for the particular purpose of holding hot water. For " in a case," said Cotton L.J., " where the discussion begins with the fact that the description of the goods by which they were sold points to one particular purpose only it seems to me that the first requirement of the subsection is satisfied, namely, that the particular purpose for which the goods are required should be made known to the seller."[46]

And in *Frost* v. *Aylesbury Dairy Co.*[47] the plaintiff bought milk for " family use " and it was held that the purpose for which the milk was supplied was sufficiently made known to the sellers by

[42] The decision was followed in *Morelli* v. *Fitz & Gibbons* [1928] 2 K.B. 636, where the facts were substantially the same, and the court definitely disapproved Vaughan Williams L.J.'s doubt, which however was a legitimate one. It is also submitted that these decisions, as well as of *Cointat* v. *Myham* [1913] 2 K.B. 220, constitutes the definitive over-ruling of *Emmerton* v. *Mathews* (1863) 7 H. & N. 586 and *Smith* v. *Baker* (1878) 40 L.T. 261, cases which show that *caveat emptor* might apply to the purchase of food sold by a dealer. For a somewhat different explanation of all these cases, see Benjamin, *op. cit.*, 633–9.

[43] [1902] 2 Ir.Rep. 585.

[44] At pp. 611, 613.

[45] [1903] 2 K.B. 148.

[46] At p. 153.

[47] [1905] 1 K.B. 608; followed in *Jackson* v. *Watson* [1909] 2 K.B. 193. These cases have been the subject of an interesting controversy among American lawyers. See, Waite, " Retail Responsibility and Judicial Law Making " (1937) 34 Mich.L.R. 494; Brown, " The Liability of Retail Dealers for Defective Food Products " (1939) 23 Minn.L.R. 585; Waite, " Retail Responsibility—A Reply " (1939) 23 Minn.L.R. 612.

its description, *i.e.*, it had to be fit for the particular purpose of "family use."

Although in all these cases the seller had supplied unmerchantable goods, the courts had to pray in aid the peculiar metaphysics of "particular purpose." And it is, perhaps, somewhat perturbing to think what the courts would have done or said if, for example, the girl had not actually eaten her crabs "on the evening of the sale," but for breakfast; if the hot-water bottle had broken without hot water having been poured into it; or if the housewife had not expressly indicated that the milk she bought was intended for "family use."

With so free a manipulation of "particular purpose," the practical result of these decisions is that a seller is now under a duty to supply merchantable goods, whether the goods are specific or not or whether the buyer has seen them or not. In other words, the whole distinction between sale by description and sale of specific goods, as far as seller's liability in damages for defective quality is concerned, and with it also any significant distinction between subsections (1) and (2) of section 14 of the Act, have completely broken down. All this, it will be seen, represents but the classical law of warranty (enunciated as long ago as *Shepherd* v. *Pybus* (1842) [48]), even if in somewhat different garb. And, whilst it does not matter by what name the seller's duty or liability is called, the abandonment of the concept of warranty may constitute a certain source of danger. The danger is that by referring to the terms of "description" or "particular purpose" we may tend to overlook the reliance-basis of the implied warranty, especially in applying section 14 (2). A brief analysis of *Thornett & Fehr* v. *Beers & Sons* (1919) [49] will show this clearly. The defendants bought some specific barrels of glue, and they were offered every opportunity to inspect the goods. Being pressed for time they merely inspected the outside of the barrels. When the plaintiffs sued for the price, the defendants counterclaimed on the ground that the glue was not merchantable quality. It was held by Bray J. that the buyers had "examined" the goods "within the meaning of the subsection," [50] *i.e.*, section 14 (2), so that no liability could be imposed. The learned judge also directed his attention to the question which he thought the most important, namely, whether the buyers having only *partly* relied on the description had thus bought "by description" within section 14 (2).[51] This was not, however, the right way of looking at the

[48] 3 M. & G. 868; see also § 4, *supra*.

[49] 1 K.B. 486.

[50] At 489. Although the decision is here criticised from the point of view of theory, the decision may nevertheless be regarded as correct since the buyers were prepared to take the risk, the price being low. In such a situation, there is perhaps good reason to apply the rule of *caveat emptor*.

[51] At 488. Although the learned judge said that he left this question open, he assumed, and indeed had to assume, that the sale was one by description despite the fact that the buyer had not solely relied on the description.

problem. The real question was whether the buyers exercised a judgment of their own with regard to the *quality* of goods; and the question was not whether the sellers had described the article as "glue," and the buyers had relied on this description. For this description said nothing about the merchantability of the glue. Furthermore, it was precisely from this point of view of whether the buyers had exercised a judgment of their own that the question of "examination" assumed importance. For although the buyers had examined the outside of the goods, they had no knowledge of the quality of the glue itself. Since the buyers did not have knowledge by acquaintance [52] of the goods, there was no reason to exclude the warranty of quality. This, however, involves a further problem: supposing a seller provides full opportunity of inspection, must the buyer actually examine the goods or run the risk of *caveat emptor*? It is submitted that mere opportunity for examination should make no difference to the legal duty to supply merchantable goods, if the seller is a dealer and thus may be supposed to have superior knowledge of the goods.[53] Indeed, if the rule were otherwise, the protection provided by the implied-by-law warranty of quality would become quite slender, as an argument of the existence of some sort of opportunity could be advanced in the vast majority of situations. The whole *rationale* of the implied warranty of quality is, precisely, that actual examination is unusual or improbable and, often enough, quite impractical and cumbrous. Hence, the necessity to protect the buyer, at least where the seller is a dealer and is therefore in a much better position to know the qualities or defects of the goods.

The source of danger previously referred to can now be well appreciated. For it is obvious that in talking about "description" as such the essential inquiries may easily be lost sight of. On the other hand, by keeping in mind the function and the *rationale* of the implied warranty, the various errors of approach (exemplified, for instance, in Bray J.'s reasoning) cannot really arise.

10. Conditions and Warranties. The extension of sale by description to certain sales of specific goods caused another difficulty of considerable importance. The difficulty was, as Salmond J. put it, whether "the common law distinction between a condition and a warranty [had] been destroyed in respect of all contractual descriptive statements as to specific goods sold, or [whether] some

[52] For the significance of "knowledge by acquaintance," see § 7, *supra*.

[53] This would seem to be the law at present, for "examination" now probably means actual examination of the goods themselves and not merely superficial inspection; see Benjamin, *op. cit.*, 643n. (a); *cf.* also *Josling* v. *Kingsford* (1863) 13 C.B.(N.S.) 447. It is also submitted that this is the only acceptable view concerning the duty to supply merchantable goods in view of s. 34 of the Act under which no "acceptance" is deemed to have taken place unless and until the goods are fully examined. See Benjamin, *op. cit.*, 740 *et seq.*

descriptive statements [were] merely conditions and others merely warranties as at common law." [54]

But this common law distinction to which the learned judge referred did not, in general, exist. What the common law had done was to call the seller's descriptive statement as to the quality of goods a " condition " where the sale was by description and to call it a " warranty " where the sale was for specific goods.[55] In other words, the distinction between " conditions " and " warranties " corresponded to the distinction between sale by description and sale of specific goods; and there was, therefore, no separate distinction between one type of descriptive statement as to specific goods called " condition " and another type called " warranty." As far as the sale of specific chattels was concerned, every descriptive statement amounted to a " warranty." It is true that in one case, *i.e.*, where the specific goods proved to be completely worthless, would the common law speak of " breach of condition "; but this terminology confused the " condition " with the quasi-contractual right of recovering the purchase-price where there had been a complete and total failure of consideration.[56]

Indeed, the distinction to which Sir John Salmond referred was thus not a nineteenth-century distinction, but one that was in fact first enunciated in 1917 by Bailhache J. in *Harrison* v. *Knowles & Foster*.[57] This is, unfortunately, the most confusing distinction of all, and must therefore be considered in some detail.

In *Harrison* the defendants wanted to sell ships and delivered to the plaintiffs certain particulars which stated, inter alia, that the ships in question were of a dead-weight capacity of 460 tons each. The particulars furthermore provided that the defendants were not to be " accountable for errors in description." The plaintiffs, relying on these particulars, bought the ships, but subsequently discovered that their dead-weight capacity was only 360 tons for each ship. They brought an action against the defendants to recover damages for (i) breach of condition, and (alternatively) (ii) breach of warranty, but the learned judge held that the misstatement of the dead-weight capacity amounted to a breach of warranty, and not to a breach of condition; and since the defendants were not liable for " errors in description," the action on the warranty had to fail. The reasoning which led the learned judge to this conclusion was rather curious. Having stated that the authorities were numerous and conflicting, Bailhache J. continued [58]:

[54] *Taylor* v. *Combined Buyers Ltd.* (1924) N.Z.L.R. 627.

[55] This has already been discussed; see § 5, *supra*.

[56] *Ibid.*, *supra*. For further discussion of the condition, *cf.* " The Contractual Concept of Condition " to be published in (1953) 69 L.Q.R.

[57] [1917] 2 K.B. 606; affirmed by C.A. on different grounds without disapproval of Bailhache J.'s reasoning: [1918] 1 K.B. 608. Nor does *Harrison* v. *Knowles* seem to be affected by *Couchman* v. *Hill* [1947] K.B. 554, which is discussed § 12, *infra*.

[58] [1917] 2 K.B. 606, at 610.

"I proceed, therefore, to the difficult task of deciding between condition and warranty, and I have come to the conclusion that the rule to apply is that where the subject-matter of the contract of sale is a specific existing chattel a statement as to some quality possessed by or attaching to such chattel is a warranty, and not a condition, unless the absence of such quality or the possession of it to a smaller extent makes the thing sold different in kind from the thing as described in the contract. Applying this principle here, and making, I hope, full allowance for the importance of the statement about dead-weight and the serious discrepancy between that statement and the true fact, it seems to me that the difference is essentially one of degree and not of kind, and that the statement as to dead-weight capacity was a warranty and not a condition.

"An extreme instance of the application of the rule I have laid down for myself will be found in *Barr* v. *Gibson*.[59] An instance the other way will be found in *Varley* v. *Whipp*,[60] and the illustrations given by Channell J. in that case show the difficulty of drawing the line between conditions and warranty in any given case. I am anxious to make it clear at the expense of reiteration that I am confining my observations to the sale of an existing chattel."

It must be realised that in this case the learned judge was not concerned with the distinction between conditions and warranties from the point of view of the buyer's right of rejection, for rejection did not arise. The judge was trying to find some sort of *intrinsic* distinction between conditions and warranties in relation to specific goods, and he believed that he had found it in contrasting the decisions in *Barr* v. *Gibson* and *Varley* v. *Whipp*. But the former decision could hardly be taken to be correct law in the later nineteenth century, let alone correct law after section 14 (2) was extended to apply to specific chattels.[61] Furthermore, if Bailhache J.'s distinction is correct, *Varley* v. *Whipp* must be regarded as a wrong decision. The reason is that the discrepancy between 460 tons and 360 tons (a discrepancy admitted to be both serious and important), was held to be only a difference of degree, and not of kind; and being a difference of degree it amounted to a warranty and not a condition. But if this is so, the discrepancy between (to return to Channell J.'s example)[62] a four-year-old horse and a three-year-old horse could also only be a warranty irrespective of whether the misdescription was collateral or not. Similarly, the difference between the old and new machine was, on this reasoning, also only a breach of warranty, so that in *Varley* v. *Whipp*[63] the sale could not have been "conditional."

[59] (1838) 3 M. & W. 390.
[60] [1900] 1 Q.B. 513.
[61] See § 9, *supra*.
[62] See § 4, *ibid.*, *supra*.
[63] [1900] 1 Q.B. 513.

The simple, yet unfortunate, explanation of the matter is that the two judges proceeded in their thinking from (and toward) two quite different directions. Whilst, on the one hand, Channell J. was almost exclusively concerned with the "collateral" nature of the warranty, Bailhache J. was seeking for intrinsic differentials. Yet, confronted by such a divergence of approach, which line of reasoning is the lawyer to adopt? Is he to argue along *Varley* v. *Whipp*? Or to argue on the basis of *Harrison* v. *Knowles*? [64]

Admittedly, these difficulties have no importance as far as the seller's liability in damages is concerned (apart from situations with exception clauses as in *Harrison* v. *Knowles*), but the confusion becomes embarrassing when there is an action for rejection. Thus in *Taylor* v. *Combined Buyers, Ltd.* (1924),[65] the plaintiff bought a new motor-car from a dealer, which broke down after three months' use. In a suit for rescission of the contract, Salmond J. agreed that there had been a sale by description and that the car was not merchantable under its description, but he also held that the buyer could not reject the car and recover the price he paid because the defect did not amount to a breach of condition (difference in kind) but only to a breach of warranty (difference of degree), Bailhache J.'s reasoning being approved of and applied.

The result of this decision is that the hopeful development that began with *Varley* v *Whipp* seems to have been arrested. Although the sale of a specific chattel may now qualify as a sale by description, it will be a sale by description without the right of rejection. The buyer is now, of course, in a better position with regard to getting damages, but damages is in these situations not a very satisfactory remedy.[66]

[64] There is one, but very unsatisfactory, way of reconciling *Varley* v. *Whipp* with *Harrison* v. *Knowles*. We might say that (1) where the buyer buys entirely relying on description, *Varley* v. *Whipp* would apply; (2) where the buyer sees (or can see) the goods, *Harrison* v. *Knowles* would apply. On this interpretation, the word "condition" would assume the further meaning of "specific chattels which the buyer has not seen." But would it be a "condition" if the buyer has only *partly* relied on the description?

[65] (1924) N.Z.L.R. 627.

[66] *Cf.* the previous discussion on this point, § 5, *supra*. In this connection, perhaps the following may be added. Our whole legal thinking about the right of rejection seems still to be embedded in a myth. The strange assumption is that rejection is a "higher" remedy of which only sparing use is to be made and that, moreover, damages is a far less drastic as well as a more adaptable remedy. This may be true in certain types of sales, *i.e.*, those, especially, where the seller incurs considerable trouble and expense, and rejection would cause a disproportionate hardship. But in the ordinary dealer-case—where a dealer sells goods to an ordinary consumer—it is difficult to see why restitution (for the defective article bought) should not be made in kind. More precisely, to allow rejection would simplify at least two problems, *i.e.*, it would, first, make unnecessary the difficult assessment in terms of money of the full extent of the defect and, second, it would also solve the problem of what the buyer is to do with this defective chattel, even though he may recover (say) half his purchase price in damages. Furthermore, rejection seems the much more appropriate remedy even as regards the seller. Although he would have to return the full purchase-price, he would escape his liability in

There is another source of difficulty. For, in the Act, a condition is "inferentially" defined as the "right of rejection,"[67] whereas the warranty is more fully defined in section 62 (1) as "an agreement with reference to the goods which are the subject of a contract of sale but collateral to the main purpose of such contract, etc." Since a "contract of sale" is either a *sale* or an *agreement to sell*,[68] the question naturally arises whether in the case of an executory agreement to sell, *e.g.*, a sale by description, a seller's express warranty will be treated as a warranty within section 62 (1) or as a sale by description within section 13.[69] Suppose A buys from B a piano, which A has never seen. A asks B whether the piano is all right, and B gives a special undertaking that it is in excellent condition. If the piano should turn out to be broken-down, A may nevertheless not be entitled to reject it, even if the piano was at the time of sale an unascertained chattel (the seller having several pianos). For B may argue that wherever a seller gives a warranty or guarantee which is, as in the above example, admittedly collateral (though only in form), the warranty comes within the definition of section 62 (1), and hence the only right which the buyer has is a right to damages. It is true that the Act also provides that a "stipulation may be a condition, though *called* a warranty in the contract."[70] But the Act only says that a stipulation which is *called*, and we must presume wrongly called, a warranty can be treated as a condition, not that a warranty which naturally falls within the definition of section 62 (1) can be treated as a condition.[71]

From all these awkward and quite unnecessary difficulties and dilemmas there is only one way of escape. This is the solution adopted by Professor Samuel Williston, the draftsman of the American Uniform Sales Act. In the American law, the manifold pitfalls have been avoided by the unbelievably simple device of (i) defining all of the seller's obligations, express or implied, with

damages. And, even more important, the return to him of the defective article would cause him much less hardship than having to retain it would cause the private consumer. For the seller is obviously in a much better position to make good this loss: either (being a dealer) he would know much more about the repair of the article concerned; or he would possibly be able to throw back this loss upon the wholesaler or manufacturer; or he may cover himself by making such inevitable losses part of his over-heads. This also accords with best commercial practice ("the customer is always right"). Again, to allow rejection in these situations would eventually benefit the community at large both by strengthening the protection of consumers and by reducing the enormous economic waste that is caused by the futile circulation of shoddy goods.

[67] Chalmers, *op. cit.*, 175.

[68] See s. 62 (1).

[69] Indeed, the statutory definition of the warranty might be considered as an implied limitation of s. 13. But we must assume that the draftsman did not realise that the wording of s. 62 (1) and s. 13 to some extent collided with each other. See also 1 Williston, *Sales*, § 184.

[70] See s. 11 (1) (*b*).

[71] There may be another interpretation of this provision which is discussed in § 12, *infra*.

regard to the kind or quality of goods as warranties [72] and (ii) allowing for every breach of warranty a right of rejection or (if the title has passed) a right of rescission of the contract.[73] In addition, the warranty is freed from all its "collateral" entanglements. As far as the condition is concerned, the American Act confines this concept to a very special role and meaning. Thus the condition becomes that operative fact or event which limits or qualifies either the seller's promise to deliver or the buyer's promise to accept the goods.[74] Of course, inasmuch as a buyer's promise is conditional upon the seller's compliance with the warranty, the concepts of condition and warranty completely overlap, at any rate as regards their practical effect. But their entirely different functions still remain observably distinct and none of the obscurantist distinctions can arise as in English law. In brief, both the underlying theory and the terminology of the American Act are exceedingly precise and the whole conceptual framework constitutes a tremendous gain, if only for the sake of clarity. It is true that American lawyers, in spite of the general excellence of their Act, have experienced some important difficulties in its application [75]; but these are essentially difficulties of policy, *i.e.*, of the different policies that ought to be applied in different sales-situations.[76] They are not difficulties created by the gross inefficiency of concepts.[76a]

Finally, the following problem deserves some further speculation. The question must be asked how Sir Mackenzie Chalmers

[72] s. 12 of the American Act defines the warranty as follows: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's intention only, shall be a warranty." This wide definition of warranty, coupled with the fact that the goods can be rejected under the American Act for breach of warranty, whether the goods are specific or not, made s. 14 of the American Act (here identical to s. 13 of the S.G.A.) quite redundant. In the new American Draft Commercial Code, "description" is treated as an express warranty. See further (1948) 57 Y.L.J. 1365 *et seq.*; Honnold, "The Buyer's Right of Rejection: A Study in the Impact of Codification upon a Commercial Problem" (1949) 97 Univ. of Penns. L.R. 457, esp. at 460, n. 17; see also 1 Williston, *Sales*, §§ 178 *et seq.*

[73] See s. 69 of the American Act; 3 Williston, *Sales*, § 603. Under s. 69 the buyer had to elect between the right of rejection and damages or rescission without damages. This anomaly will be abolished in the new American Commercial Code.

[74] See Williston's remarks, 1 Williston, *Sales*, §§ 179, 180.

[75] For a discussion of these difficulties, see Honnold, *op. cit.*; also Eno, "Price Movements and Unstated Objections" (1935) 44 Yale L.J. 786.

[76] Nevertheless, Professor Karl N. Llewellyn has said: "I think it can be shown that the English warranty-condition set-up can be and often is used to evade many of the more unfortunate consequences with materially more efficiency than is ours by the accepted concepts of our acts," "On Warranty of Quality, and Society" (1936) 36 Columbia L.R. 699, at 731. It is significant, however, that Professor Llewellyn, the draftsman of the sales-provisions of the new American Commercial Code, has in this respect retained the Williston tradition. The confusion of the English law, as he put it to me in private conversation, is too high a price to pay for its other possibilities.

[76a] *Cf.* my article, "The Logical Status of a Legal Principle" (1953) 20 U. of Chicago L.R. 181, at 201–2.

could have left the warranty and condition in so unsatisfactory a state. Was he not aware of the various complications that were bound inevitably to arise? The explanation would lie in Chalmers' annotation [77] to the effect that the new statutory term "condition" is equivalent to the old term "dependent covenant," whereas the term "warranty" is equivalent to the old "independent covenant." And "[now] the term 'dependent promise' appears to be merged in the wider term 'condition precedent.'" [78] But this whole statement is utterly misleading. In the first place, it is wrong to say that the term "dependent promise" has become merged in the term "condition precedent." The condition precedent only makes the promise dependent and is not itself a promise. Of course, we can say that a promisor has not performed a condition, but in this sense the word "condition" is used in the sense of promise and not dependent promise. One cannot perform a "dependent promise"; the performance of one's promise can, however, be dependent upon a certain fact or event, *e.g.*, the performance of the other party's promise.[79]

Again, the annotation also shows that Chalmers misconceived the whole relevance of the doctrine of the dependency and independency of covenants in relation to the law of sales. The basic purpose of this doctrine, very briefly, was to avoid a forfeiture through the operation of a condition precedent.[80] Thus where one party's promise was on the face of it dependent or conditional upon *full* performance by the other, and where the latter had not fully performed his contract but had in the course of it conferred an enduring benefit upon the former (*e.g.*, by erecting a building or by carrying freight), the courts would construe the promise as "independent," *i.e.*, they would in effect reconstrue the promise to avoid the unjust consequence of one party receiving a substantial benefit for nothing.

But it is clear that this particular injustice could not arise in the sale of goods, simply because the buyer could, or could be made to, return the benefit (*i.e.*, the goods) received. Nevertheless, the advent of *Street* v. *Blay*,[81] that is, the rule that the buyer could not reject specific goods, also led to the idea that "the vendee having been thus benefited by the partial execution of the contract, and because the proprietor of the thing sold [could not] treat the failure as a condition broken . . . must have recourse to

[77] Chalmers, *op. cit.*, 244–5.
[78] *Ibid.*, 224.
[79] *Cf.* Professor Goble's valuable note, "Dependent Contracts" (1927) 22 Illinois L.R. 299; see also 1 Williston, *Sales*, § 180, n. 8.
[80] This development began with *Boone* v. *Eyre* (1779) 1 H.Bl. 273n. It must be pointed out, however, that I am here stressing only one aspect of the doctrine of dependency and independency of covenants. It played a many-sided and vital part in the development of our contract law and its confused history stretches from the seventeenth to the nineteenth century. It cannot, unfortunately, be discussed here any further.
[81] (1831) 2 B. & Ad. 456; see § 5, *supra*.

an action for damages in respect of the breach of warranty." [82] In other words, there emerged a distinction between conditions and warranties which somewhat corresponded to, but was by no means identical with, the much older and functionally very different distinction between dependent and independent promises. Even so, however, the similarity of these distinctions was strictly confined to the sale of specific goods because of the non-rejection rule of *Street* v. *Blay*. Only in this situation was it true to say that the buyer's promise to accept (and pay for) the goods was not conditional or dependent upon the seller's compliance with the warranty; not being so conditional, the only redress the buyer had for breach of warranty was to sue in damages. But as far as the sale by description was concerned, the non-rejection rule did not apply, so that the buyer's promise remained conditional or dependent upon full compliance with the warranty, and the above distinction between condition and warranty became inapplicable as well as inappropriate.[83] Unfortunately, Chalmers did not see this. He generalised the condition-warranty distinction to fit the dependent-independent covenant distinction. To do this, he transformed the meaning of condition from a qualification of the buyer's promise to accept the goods into an obligation of the seller to give merchantable or " described " goods coupled with the buyer's right of rejection. And he changed the meaning of warranty from the seller's express or implied duty to supply merchantable goods to the meaning of an express " collateral promise " or " undertaking." [84] Once this inelegant and unnecessary step was taken, the condition naturally appeared a superior creature in comparison with what was merely a collateral warranty.

11. The Warranty and Innocent Misrepresentation.[85] A few words need now be said about the exact relationship between warranty and innocent misrepresentation. In this connection, the first question is whether the equitable action of innocent misrepresentation has any application *at all* to sale of goods. This problem seems to have been fully discussed in only one case, namely, *Riddiford* v. *Warren* (1902),[86] where the New Zealand High Court reviewed the older textbooks and came to the conclusion that innocent misrepresentation was outside the scope of sale of goods. This view was based on certain provisions in the Sale of Goods Act. Thus, according to section 53 (i), a buyer is not entitled to reject the goods " by reason only of " a breach of warranty, the word " only " being inserted to allow the buyer to reject the goods if

[82] *Per* Williams J. in *Behn* v. *Burness* (1863) 3 B. & S. 751, at 755.
[83] See also § 6, *supra*.
[84] Chalmers, *op. cit.*, 225.
[85] For an illuminating general analysis, see Williston, " Liability for Honest Misrepresentation " (1918) 24 Harvard L.R. 415.
[86] 20 N.Z.L.R. 572.

there is "some other invalidating cause." But "some other invalidating cause" does not, on the face of it, include equitable causes, as in section 61 (2) only those rules are saved which form part of the common law. In short, it was the court's considered view [87] that Chalmers had by section 62 (1) expressly excluded the equitable action. Indeed, the same view was held by Benjamin.[88]

On the other hand, it was either said or implied in other decisions [89] that the equitable action would be applicable to sale of goods, at any rate to an executory sale by description.[90] And in the more recent case of *Leaf* v. *International Galleries*,[91] the equitable action was actually entertained for the rescission of a sale of a specific chattel. The facts were that the plaintiff in 1944 bought a painting which the sellers represented as a Constable. In 1949 he discovered it to be a fake and sued for the rescission of the contract and the return of the purchase price. The county court gave judgment for defendants, on the ground that the action was unavailable where the contract had been executed. On appeal, this judgment was upheld but on a very different ground: even assuming the remedy to be applicable to an executed sale, it was held not to have been exercised within a reasonable time.[92] "[Although] rescission," said Denning L.J., "may in some cases be a proper remedy, it is to be remembered that an innocent misrepresentation is much less potent than a breach of condition; and a claim to rescission for innocent misrepresentation must at any rate be barred when a right to reject for breach of condition is barred.[93] A condition is a term of the contract of a most material character, and if a claim to reject on that account is barred, it seems to me *a fortiori* that a claim to rescission on the ground of innocent misrepresentation is also barred. So, assuming that a contract for the sale of goods may be rescinded in a proper case for innocent misrepresentation, the claim is barred in this case for the self-same reason as a right to reject is barred." [94]

But what, it may respectfully be asked, *is* a proper case for the action of innocent misrepresentation? If, on principle, rejection is barred in the absence of a breach of condition, what possible

[87] See *ibid.*, especially at 579.

[88] *Op. cit.*, at 427.

[89] *Harrison* v. *Knowles* [1918] 1 K.B. 608, at 609–10; *Lever Bros.* v. *Bell* [1931] 1 K.B. 557, at 588; *Bell* v. *Lever Bros.* [1932] A.C. 161, at 224; *Mackenzie* v. *Royal Bank of Canada* [1934] A.C. 468, at 475; and see for further discussion 3 Williston, *Sales*, §§ 632 *et seq.*

[90] Thus in *Heilbut* v. *Buckleton* [1913] A.C. 30, at 51, Lord Moulton made it clear that his restrictive views about innocent misrepresentation were confined to the sale of specific goods and did not extend to the sale by description; as to this case, see § 2, *supra*.

[91] [1950] 2 K.B. 86; [1950] 1 All E.R. 693.

[92] See especially *per* Denning L.J. at 90; 1 All E.R. at 695.

[93] The learned judge had already held that Leaf's right to reject for breach of condition was barred under the combined effect of ss. 11 (1) (*c*) and 35 of the S.G.A.

[94] [1950] 2 K.B. at 90–1; [1950] 1 All E.R. at 695.

room is there for a right to reject on the ground of innocent misrepresentation? If a seller's representation is regarded as a term of the contract, the question of rejection can only depend upon whether that term is "according to our terminology, either a condition or a warranty."[95] It follows that the applicability of the equitable action can only then arise when the representation is not a term of the contract[96]; but to say this is to reveal a strange absurdity. For an innocent misrepresentation which is not a term of the contract will give rise to a right of rescission or a right to reject the goods,[97] while the same misrepresentation, if treated as a term of the contract, may often only be a warranty and thus give rise to a liability in damages alone. The equitable action, moreover, does not only permit rescission but also includes the right to an "indemnity"[98] as part of the *restitutio in integrum*; and it is therefore quite clear that it certainly is a superior remedy. But, then, the immediate and exciting question is, why has the action practically never been used in the law of sale of goods?

To answer this, however, requires some discussion. To begin with, let us briefly examine the decision in *Redgrave* v. *Hurd* (1881)[99] the classical illustration of innocent misrepresentation in the sale of land. The parties agreed for the purchase of a house together with the goodwill of a business. In the course of negotiation, the vendor innocently misrepresented the annual profits of that business, which misrepresentation, it will be noticed, was not a term of the contract, nor could it be added to it by virtue of the parol evidence rule. The buyer, therefore, could not bring an action *on* the contract, but had to rely on an independent course of action to obtain the rescission of the contract. While *Redgrave* v. *Hurd* is a typical example of what may happen in the sale of land, a rather different situation arises in the sale of goods. The reason is that the law of warranty changed the law of sale of goods, as compared with the sale of land, in the following three important respects. In the first place, the implied-by-law warranty of quality and fitness has limited the rule of *caveat emptor* to a considerable extent, whereas in the sale of land the rule of *caveat emptor* has remained supreme since (in the well-known phrase) "fraud apart, there is no law against [selling] a tumble-down house."[1] Hence, a vendor of land has no other duty than to convey the "land" which is the expressly stated subject-matter of the contract; the vendor of goods, on the other hand, is under an additional duty to

[95] *Ibid.*, at 89.
[96] *Cf.* Cheshire and Fifoot, *Law of Contracts* (2nd ed.) 202.
[97] *Abrams S.S. Co.* v. *Westville Shipping Co.* [1923] A.C. 773, at 781–9.
[98] The theoretical distinction between an indemnity in equity and damages at common law is, of course, well known, but the distinction is neither really convincing nor often of any practical significance; *cf. Whittington* v. *Seale-Hayne* (1900) 82 L.T. 49; 16 T.L.R. 181.
[99] 20 Ch.D. 1.
[1] *Robbins* v. *Jones* (1863) 15 C.B.(N.S.) 221, at 240. See on all this, Glanville L. Williams, "The Duty of Non-Occupiers" (1942) 5 M.L.R. 194.

supply merchantable goods. In the second place, the implied warranty of quality and fitness has also virtually broken down the parol evidence rule: of this section 14 (1) is an obvious example, for parol evidence that the buyer indicated the " particular purpose " is patently essential to make the subsection apply, however written the contract otherwise may be.[2] And even more generally, parol evidence of a seller's express guarantee of quality becomes rather unnecessary and out of place, because the appropriate warranty is in any case implied. In the third place, where the seller makes a misrepresentation about the goods, the descriptive statement will amount to (at least) a warranty, whether or not it is also regarded as a term of the contract. For as we have already seen, not only a representation forming part of the contract is a warranty, but a representation inducing the formation of the contract, *i.e.*, inducing the buyer to buy or to accept the offer, amounts to a warranty as well.[3] Moreover, it follows from all this that the sharp distinction between " negotiation " and " contract," so prevalent in the sale of land, does not exist at all in the sale of goods, for the warranty neatly and efficiently cuts across it. Whilst, as regards land, the action of innocent misrepresentation is the only protection the buyer has for a misrepresentation during the course of negotiation inducing him to buy, in the case of goods the seller is made liable in damages (subject to the operation of *caveat emptor*), and will also be compelled to take back the goods (subject to the operation of the doctrine in *Street* v. *Blay*) for any innocent or negligent misrepresentation concerning the kind or quality of the goods. However, this liability for innocent misrepresentation appeared in the common law under rather different names: it was referred to either as breach of warranty, or as breach of condition, or as breach of contract of sale by description. And the existence of this liability was also hidden behind a body of superimposed distinctions, *i.e.*, the distinction between sale of specific chattels and sale by description and that between conditions and warranties which have all been previously discussed.[4]

The conclusion is that the weighty controversy about the applicability of the equitable action is quite beside the point. Since the common law had in fact established liability for innocent misrepresentation,[5] there was no gap which equity could fill.

2 A recent, and indeed extreme, example of the break-down of the rule is *Couchman* v. *Hill* [1947] K.B. 554, which is discussed, § 12, *infra*.

3 See § 2, *supra*.

4 See §§ 4, 6, 10, *supra*.

5 That this has not been generally realised can be seen from Lord Moulton's famous statement in *Heilbut* v. *Buckleton* [1913] A.C. 30, at 51: " It is . . . of the greatest importance that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made."

Indeed, the whole controversy merely reminds one of the good Monsieur Jourdain—who discovered rather late in life that he had always been talking prose.

12. The Problem of Bannerman *v.* White. There is one decision which has stood somewhat outside the main current of events, but a discussion of which seems both important and appropriate. The decision is that in *Bannerman* v. *White* (1861) [6] where the defendants bought a large quantity of hops. But before they accepted the plaintiffs' offer, they had inquired whether sulphur had been used in the treatment of the hops, adding that if it had they would not even ask the price. Although the plaintiffs answered (in the presence of six witnesses) that no sulphur had been used at all it was later discovered that some had been used, though only in the cultivation of five out of 300 acres. After delivery, the buyers resisted an action for the price on the plea of non-assumpsit.[7] On these facts, Erle C.J. gave judgment for the buyers, saying, inter alia: "The undertaking [*i.e.*, the sellers' representation that no sulphur had been used] was a preliminary stipulation; and if it had not been given the defendants would not have gone on with the treaty which resulted in the sale. In this sense it was a condition upon which the defendants contracted." [8] And he further said: ". . . the intention appears that the contract should be null if sulphur had been used." [9]

Now counsel for the plaintiffs had strenuously argued that, the hops having been delivered to the buyers, property had passed to them, and that they could no longer reject the goods, or resist an action for the price, because of the doctrine in *Street* v. *Blay*.[10] And so impressed, it would seem, was the learned judge by this contention—which, on the face of it, seemed conclusive in favour of the sellers,—that he avoided disposing of it in detail. Instead, he developed a novel line of reasoning in which "contractual intention" became the vital test. Although the principle that emerges from *Bannerman* v. *White* looks like yet another device to escape the consequences of *Street* v. *Blay*,[11] it also contains some wider and more far-reaching implications. In the first place, every transaction might be dealt with in accordance with the rather arbitrary and elusive canon of "intention." Especially, for example, where the seller gives a warranty collateral in form, his

[6] 10 C.B.(N.S.) 844.

[7] *Cf.* this decision with *Dawson* v. *Collis* (1851) 10 C.B. 523 where the buyer had similarly pleaded non-assumpsit which, however, was held to be an argumentative traverse.

[8] 10 C.B.(N.S.) 844, at 860.

[9] *Ibid.*

[10] See § 5, *supra*.

[11] From this point of view, the decision is closely connected with the development that led to the extension of sale by description which we have already discussed at length, see §§ 6, 9, *supra*.

statement might easily be regarded as the basis upon which the buyer makes the contract. In other words, the collateral warranty, while merely giving rise to an action in damages under section 62 (1), could thus be transformed into the most potent right of rejection under the principle of *Bannerman* v. *White*. In the second place, this type of reasoning would, in effect, make nonsense of the whole structure of the law as developed in the nineteenth century and as embodied in the Sale of Goods Act. For there would be little point in talking about "warranties" or "conditions," or "sale by description," or "sale of specific chattels," since everything could in final analysis be reduced to the notion of "contractual intention." The trouble, however, is that "intention," or what the judges consider to be this "intention," is unpredictable indeed. The recent case of *Couchman* v. *Hill* [12] provides a striking illustration. The plaintiff purchased at an auction sale a heifer described as "unserved." The printed contract contained the usual auctioneer's exception clauses, *i.e.*, that the sellers would on no account be liable in damages and that the goods must be taken "subject to all faults or errors of description." At the sale, however, the defendant had asked the auctioneer and the seller whether they would confirm that the heifer was really "unserved," and they in fact did so. But the heifer turned out to be in calf and died as a result of it. In an action for damages for breach of contract the Court of Appeal overruled the county court and gave judgment for the plaintiff. Scott L.J. found in the judgment of the county court an "implicit finding that it was not the intention of the parties to exclude the stipulation," [13] *i.e.*, the special verbal confirmation. The learned judge continued [14]: "There was a good deal of discussion as to whether the description 'unserved' constituted a warranty or a condition. I have, in what I have said so far, deliberately refrained from expressing a view thereon, but as a matter of law, I think every item of description which constitutes a substantial ingredient in the 'identity' of the thing sold is a condition [15] . . . I think there was here an unqualified oral condition, the breach of which the

[12] [1947] K.B. 554.

[13] [1947] K.B. at 559.

[14] *Ibid.* Although *Bannerman* v. *White* was not expressly referred to in the judgment, the decision was cited before the court; and it is obvious that its reasoning was not only followed but indeed extended. For whereas *Bannerman* was a sale by description, at any rate in its extended sense, *Couchman* was the sale of a specific chattel. Had the heifer lived, the buyer would undoubtedly have been entitled to reject it, even in spite of the very broad exception clauses.

[15] This is broadly in accord with Bailhache J.'s distinction in *Harrison* v. *Knowles* [1917] 2 K.B. 606, at 610, between differences in kind (conditions) and differences of degree (warranties) with regard to the sale of specific goods. The only question is whether the difference between an "unserved" and a pregnant heifer is a difference in kind. See also § 10, *supra*.

plaintiff was entitled to treat as a breach of warranty and recover the damages claimed." [16]

The practical problem, however, is when does a statement between the parties become so "overriding" as to show the "contractual intention" upon the basis of which the parties can be said to have agreed, and indeed agreed irrespectively of the written words the contract may contain? Is it to be of importance that the seller makes his statement in the presence of six witnesses (as in *Bannerman* v. *White*), or whether the buyer requests a special confirmation (as in *Couchman* v. *Hill*)? [17]

In the light of these decisions, the provision in section 11 (1) (*b*), namely that a "stipulation may be a condition, though called a warranty in the contract," assumes renewed significance. For every stipulation might be an "overriding condition," if the court holds it was so "intended."

13. Summary. Because of the diversity of the points and problems previously discussed, it may be useful to state very briefly the main conclusions here arrived at.

1. The law of sale of goods is obviously in very great confusion and has no consistency whatever. In its present state, the law provides for one and the same fact-situation different legal principles giving rise to different legal consequences. By applying the appropriate conceptual permutations, we may arrive at any result we wish.
2. As regards the nineteenth-century development, the core of the confusion can be traced back to the legacy of *Barr* v. *Gibson* (1838) [18] and to the doctrine in *Street* v. *Blay* (1836).[19] These decisions obscured the simple and straightforward paths along which the common law could and should have travelled. Nor did the Sale of Goods Act, 1893, do anything by way of real clarification. Indeed, the draftsman

[16] It is submitted that the real *ratio decidendi* should be sought in Scott L.J.'s final paragraph of his judgment [1947] 2 K.B. at 559, where he protested against the use by auctioneers of the broad exception clauses in their printed contracts. "The printed condition that the vendor will take no responsibility for errors of description of things or animals specifically offered for sale on inspection is reasonable for visible defects, but for qualities or attributes which are invisible it is not reasonable. It may well become a mere trap for the unwary." In other words, the decision really represents a determined judicial effort to ensure a fair exchange between the parties whatever the actual terms of the contract may be. From this point of view, the whole treatment of exception clauses in English contract law needs further study and clarification. What we may discover is a new principle of public policy restricting freedom of contract and insisting upon sellers giving real, and not merely illusory, value for their price.

[17] Another question is how the decision in *Couchman* v. *Hill* can be squared with the parol evidence rule. It is submitted that the only tenable explanation of it is to regard the printed document (to use the terminology of American *Restatement of Contracts* § § 228, 229) as a "non-integrated" contract.

[18] 3 H. & W. 390.

[19] 2 B. & Ad. 456.

merely perpetuated several unnecessary distinctions and, furthermore, added many difficulties of construction of his own.

3. To understand the law of sale of goods, the law of warranty must first be grasped, especially the question as to what may constitute a warranty. Thus it has been shown that a warranty may be either a promise or a representation; that when the warranty is a representation its basis is the buyer's justified reliance; and that it is completely unimportant whether a warranty is "collateral" or not.
4. Once the functions of the warranty are fully understood, the difficult problems concerning "sale by description" as well as "innocent misrepresentation" fall into perspective. Furthermore, the distinction between the sale of a specific chattel and the sale by description is seen as both logically and legally untenable. It has in fact already largely broken down.
5. The many meanings which "condition" has acquired are almost all confusing. Its real meaning should be one and only one, *i.e.*, an operative fact or event upon which the *performance* of the (buyer's) promise (to pay or accept the goods) depends. In short, "condition" should no longer mean "stipulation," or "promise," or "total failure of consideration," or "difference in kind." Nor should it constitute a superior creature in contra-distinction to the warranty.
6. Needed above all: a thorough revision of the Sale of Goods Act with respect to the defective quality provisions.

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(Concluded)

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STATUTES

The Defamation Act, 1952

(A) *The Period of Gestation*

The Parliamentary history of this Act, which came into operation on November 30, 1952, began in 1938 when a private member's Law of Libel Amendment Bill was withdrawn after an assurance had been given by the then Attorney-General (Sir Donald Somervell), that a committee would be established to consider the law of defamation.[1] This committee, under the chairmanship of Lord Porter, was appointed in 1939, but the outbreak of war interrupted its work and consequently its report was not published until 1948.[2]

The post-war Labour Government was on several occasions pressed to introduce legislation which would implement the committee's recommendations, but the legislative programme was overburdened with other projects.[3] Moreover, amendment of the law of defamation became coupled, in some minds, with the desirability of the establishment of a Press Council[4] which had been recommended by the Royal Commission on the Press and unanimously approved by a motion of the House of Commons in 1949.

Nine days after the Attorney-General of the Conservative Government, which was returned to power in October, 1951, had replied negatively to members' questions asking for legislation to amend the law of defamation,[5] Mr. Harold Lever, a Labour Member of Parliament, was successful in the private members' ballot and introduced his Defamation (Amendment) Bill.[6] Its passage through Parliament was by no means uneventful and only Government support, together with the dropping of some of its more provocative provisions, saved the measure from total wreck.

(B) *The Provisions of the Act*

With several minor exceptions, the provisions of the Act follow closely the amendments of the substantive law recommended

1 343 H.C.Deb., at 576. It is interesting to observe that the Bill had been instigated by the Empire Press Union on whose behalf Mr. Valentine Holmes had drafted the most important clauses; see Mr. Richard O'Sullivan's criticisms in 75 L.J., at p. 440. Of the Lever Bill, Mr. Dennis Lloyd has acutely observed, "Not unnaturally, the new Bill has been greeted with acclamation by the press, as though a new age of liberation had dawned." *Current Legal Problems* (1952) 168, at p. 188.

2 Cmd. 7536; see Mr. E. Hall Williams' critical analysis in 12 M.L.R., at p. 217.

3 457 H.C.Deb. 513; 468 H.C.Deb. 474.

4 477 H.C.Deb. 20; 487 H.C.Deb. 375; see also 13 M.L.R., at p. 353.

5 494 H.C.Deb. 103.

6 *Ibid.*, at 2390.

by the Porter Committee.[7] These will now be severally noted.

(i) "*Unintentional Defamation*"

The principal criticism of the old law, voiced by newspapers and authors, was that defendants were frequently mulcted in damages by gold-digging plaintiffs for libels which had been published quite innocently. Such legalised blackmail may in fact have occurred from time to time, though undoubtedly the newspapers have always overstated the extent of their victimisation. That such blackmail was theoretically possible followed from the common law conception that the test of defamation was not *subjective* but *objective*: *i.e.*, "Did the publication tend to lower the plaintiff's reputation in the estimation of right thinking members of society generally?" The defendant's motives, intention or knowledge were irrelevant in determining whether, as a matter of law and fact the publication could be, and was, defamatory of the plaintiff. The high-water mark of the objective doctrine was reached in the celebrated trilogy of cases, *Hulton* v. *Jones* [1910] A.C. 20; *Newstead* v. *London Express* [1940] 1 K.B. 377 and *Cassidy* v. *Daily Mirror* [1929] 2 K.B. 331, and it is the purpose of section 4 of the Act to modify the law enshrined therein.

It must be emphasised at the outset that section 4 (5) limits the scope of section 4 to two types of "unintentional defamation," *viz.*: (a) Words defamatory on the face of them which the publisher did not intend to publish of and concerning the plaintiff *and* where he did not know of circumstances by virtue of which they might be understood to refer to the plaintiff.

This category is designed to cover such libellous statements as founded the actions in the *Hulton* and *Newstead Cases*.

(b) Words not defamatory on the face of them, and where the publisher did not know of circumstances by virtue of which they might be understood to be defamatory of the plaintiff. Here the legislature seems to have had in mind such situations as arose in the *Cassidy Case*.

In both of these categories of unintentional defamation the publisher must satisfy the court that he, or his servant or agent, exercised all reasonable care in relation to the publication (section 4 (5)).[8] Accordingly, many examples could be given of what might loosely be described as "unintentional defamation" but which would *not* be covered by the terms of section 4. During the Committee stage of the Bill it was suggested that if a newspaper

[7] The Committee's procedural proposals had already been effected by the Rules Committee of the Supreme Court; see R.S.C. Orders, 19, rr. 6 (2), 22 and 22A; 31, rr. 1A, and 12.

[8] Some members of the Porter Committee thought this onus of proving reasonable care would weigh the scales unduly against the defendant in jury actions, *loc.cit.*, para. 73.

illustrated an article entitled "Unchaperoned Holidays" by a photograph of a man and woman bicycling together, and it turned out that they were married to different parties—their pictures having been sent separately to the newspaper in connection with a photographic competition—then the publication would not be protected by the section since it would be ousted by the obvious negligence of the publisher in using the photographs without further inquiry.

Assuming that the alleged defamation does come within one of the two specified categories, the defendant is empowered by section 4 (i) to "make an offer of amends" to the plaintiff. This procedure consists of (i) stating that the offer is made for the purpose of section 4,[9] and (ii) accompanying the statement by an affidavit specifying the facts relied on by the defendant as showing that the words were published innocently (subsection (2)).

If the plaintiff accepts the offer, the defendant must in all cases publish a suitable correction and apology, and in appropriate cases he must inform persons to whom copies containing the defamatory words have been distributed that the words are alleged to be defamatory of the plaintiff (subsection (3)). Disputes as to the form or carrying out of the offer may be referred to the High Court and, in any event, the court is empowered to make the defendant indemnify the plaintiff in respect of "expenses reasonably incurred or to be incurred by that party in consequence of the publication in question" (subsection (4)). It should be emphasised that acceptance of the offer of amends bars the plaintiff from bringing an action for general or special damages in respect of the defamation.

If the plaintiff refuses the offer, then in any subsequent proceedings against him in respect of the publication, the defendant may plead the offer in defence. In such a case the defendant must:

(i) Limit his evidence to evidence of facts specified in the affidavit, which he will have sent to the plaintiff when making the offer (subsection (2)), and

(ii) Prove that the words complained of were published "innocently" as defined by subsection (5), and

(iii) Prove that the actual author was not actuated by malice in writing the words if he has published words of which he is not himself the author (subsection (6)), and

(iv) Prove that the offer was made as soon as practicable after the defendant received notice that the words were or might be defamatory of the plaintiff and has not been withdrawn (subsection 1 (*b*)).

Section 4 is probably the most far-reaching measure in the Act and it will be interesting to see to what extent newspapers

[9] In order to distinguish an offer made under this section, which may afford a complete defence, from an offer in mitigation of damages under the Libel Act, 1843, s. 2.

and other "unintentional defamers" take advantage of its provisions.[10]

(ii) *Assimilation of Libel and Slander*

Parliament has followed the Porter Committee (with the exceptions of Mr. R. O'Sullivan Q.C., and Professor E. C. S. Wade), in refusing to assimilate *in toto* the law relating to libel and slander although there is no such distinction in Scotland, two states of Australia, or certain of the Canadian provinces. Assimilation was recommended by the 1843 Select Committee of the House of Lords and it was urged without success in the Lords during the Committee stage of the Lever Bill.

The majority of modern critics of the prevailing distinction in English law between libel and slander follow Sir William Holdsworth in condemning it as an historical anomaly which should long since have been removed by the legislature.[11] The effect of sections 1 and 2 of the Lever Act however, is to re-define the boundaries of libel and slander first by adding a further category to the list of slanders which by exception are actionable *per se*, and secondly by modifying an existing category which had almost been judicially delimited out of existence.

(a) Radio and Television

In spite of its fortuitous historical development, the common law distinction between libel and slander, *i.e.*, the permanence or impermanence of the publication, originally provided a rough but practical guide to the likelihood of damage ensuing to the defamed. If the defamatory words were merely spoken, it was unlikely that they would be heard by many people and therefore the plaintiff ought to prove his damage. The advent of radio and later of television has made nonsense of this distinction.

The text-writers had argued that whether a broadcast defamatory statement constituted libel or slander would depend on whether or not the broadcast was scripted. Against this view was the Commonwealth precedent of *Meldrum* v. *Australia Broadcasting Co.* [1932] V.L.R. 425, which held all defamatory broadcast statements to be prima facie slander. The doubt is now settled by section 1 of the Act which provides that ". . . the broadcasting of words by means of wireless telegraphy shall be treated as publication in a permanent form." This must be read in conjunction with section 16 which defines "words" as

[10] It is noteworthy that the 1843 Committee of the House of Lords rejected the suggestion of a defence of apology for unintentional defamation on the ground that it would be "quite inconsistent with safety to private character." *Tempora mutantur. . .* ?

[11] Vol. 8, *H.E.L.*, at p. 378. *Cf.* Professor Glanville Williams who sees the chief anomaly in the results rather than the form of actions for defamation. He would tackle the problem from the point of view of the proper damages, if any, to be awarded in both categories of defamation. Vol. 21, *Journal of Comparative Legislation* (1939) 161, at p. 163.

including " pictures, visual images, gestures, and other methods of signifying meaning." Therefore any defamatory matter which is disseminated by sound or television is libellous and *ex hypothesi* actionable *per se*.

Subsections 3 and 4 of section 16 define the expression " broadcasting by means of wireless telegraphy " by reference to the Wireless Telegraphy Act, 1949, and the Telegraph Act, 1863, and thereby exclude, for example, radio police-cars and taxis.

Having placed the emanations of broadcasting stations on a footing with newspapers with respect to liability in defamation, it was proper that " newspaper privileges " should be similarly extended to sound and television. Hence section 9 extends to broadcasting stations licensed by the Postmaster-General the provisions of (a) section 3 of the Parliamentary Papers Act, 1840, (b) section 3 of the Law of Libel Amendment Act, 1888, and (c) section 7 of the instant Act (which substantially re-enacts and expands section 4 of the 1888 Act).

(b) Slanders concerning office, profession or trade

One of the common law classes of slanders actionable *per se* is a slander spoken of the plaintiff *in the way of* his office, profession or trade, which tends to injure or prejudice his reputation therein. The practical value of this exception was severely limited by the very narrow construction which was placed by the courts on what was or was not said " in the way of the plaintiff's office, etc." The high-water mark of this strictness is seen in such astonishing decisions as *Jones* v. *Jones* [1916] 2 A.C. 481 (the " adulterous headmaster ") and *Hopwood* v. *Muirson* [1945] K.B. 313 (the " seven and sixpenny grandmother ").

Section 2 of the Act provides that if slanderous words are calculated to disparage the plaintiff in any office, profession, calling, trade or business which is held or carried on by him at the time of their publication, the plaintiff need not prove special damage even though the words were *not* spoken of him " in the way of his office, profession, etc."

(iii) *The Press*

The law of defamation reflects most vividly the lobbying influence of Fleet Street. At common law no privilege attached to newspaper reports of public meetings, other than judicial or parliamentary proceedings. The decisions in *Purcell* v. *Sowler* (1877) 2 C.P.D. 215 (C.A.) and *Pankhurst* v. *Sowler* (1886) 3 T.L.R. 193, were the direct causes of the Newspaper Libel and Registration Act, 1881, and the Law of Libel Amendment Act, 1888, respectively.[12] These Acts gave a qualified privilege to newspaper reports of certain types of meetings provided the publisher

[12] For the parliamentary background to these Acts see Odgers, *Libel and Slander*, 6th ed. (1929) Appendix B.

was neither actuated by malice nor had refused to print a reasonable letter or explanatory contradiction of the report. The Acts only protected journals published at intervals not exceeding 26 days.

The Lever Act extends these provisions by expanding the definition of "newspapers" to publications appearing at intervals of not more than 36 days: *i.e.*, monthlies are now included for the first time (section 7 (5)). Secondly, the scope of reports so protected by qualified privilege is widely extended by section 7 (1) and the Schedule to the Act. This Schedule is divided into two parts. According to Part 1, a newspaper can publish fair and accurate reports of seven new categories of meetings (chiefly of an international character, *e.g.*, the debates of dominion legislatures), and extracts from public documents and reports, without being obliged to print a letter or statement of explanation or contradiction. In Part 2 are listed various organisations whose reported proceedings [13] attract qualified privilege, if fair and accurate, but only if the newspaper is prepared to afford an adequate *droit de réponse* (section 7 (2)).

The specified bodies include cultural, trade and sporting organisations which have control over their members, and the privilege extends to the reports of the findings or decisions of such bodies in so far as they relate to members or persons subject to the control of the organisation by virtue of a contract. This extension therefore draws the sting of *Chapman* v. *Ellesmere* [1932] 2 K.B. 431. Part 2 also includes reports of proceedings of any public meeting in the U.K., if held for a lawful purpose to discuss matters of public concern. This is a re-enactment of section 4 of the 1888 Act which is repealed by section 18 of the Lever Act.

Reports of the public meetings of local authorities, administrative tribunals, and various other governmental inquiries are likewise protected as are reports of meetings of shareholders of public, as distinct from private, companies. Finally, Part 2 includes copies or fair and accurate reports of official notices issued for the information of the public by government departments, officers of state, local authorities and chief officers of police.

It has never been certain whether the privilege given to newspaper reports of judicial proceedings by section 3 of the 1888 Act is absolute or qualified.[14] If the latter, the section must be interpreted as merely declaratory of the common law. Section 8 of the Lever Act limits this privilege to reports of courts exercising judicial authority within the U.K. but it does not clarify the existing doubt as to the type of privilege conferred. However, section 7 and the Schedule to the Act give a *qualified* privilege to fair and accurate reports of proceedings before courts in any part of Her

[13] The privilege will not extend to comments on the reported proceedings: see *Standen* v. *South-East Recorders, Ltd.* (1934) 50 T.L.R. 365.

[14] Winfield, *Law of Tort*, 5th ed., pp. 291–2; Salmond, *Law of Torts*, 10th ed., pp. 397–8.

Majesty's dominions *outside* the U.K. This contrariety may add weight to the view that the privilege under section 3 of the earlier Act is absolute.

(iv) *General Defences*

Sections 5 and 6 of the Lever Act mitigate the strictness of the law concerning the defences of justification and fair comment. Neither defence will now fail provided the inaccurate statements of fact in the defamation do not materially injure the plaintiff's reputation, having regard to the truth of the remaining charges, or provided the comment is fair having regard to the facts which are proved to be true.

The criticism which has been voiced, outside press circles, that the Lever Act unduly favours defendants, is certainly justifiable in connection with these two sections. The 1843 committee of the House of Lords recommended that, as in criminal libel, justification should be no defence unless the defendant could satisfy the court that publication of the statement was in the public interest or for the public benefit. It appears that such is the law in New South Wales and some American states. Moreover, although the Porter Committee acknowledged that under the common law there is nothing to prevent newspapers, or anybody else, from " digging up " some unsavoury incident in the past life of a person who has since had an unimpeachable character, it reported against the notion of grafting the public interest element on to the defence of justification, on the ground that the remedy would be more dangerous than the disease. It relied on " . . . the regrettably less efficacious sanction of good taste, and to the internal control by the press . . ." (*loc. cit.*, para. 78). Unfortunately the press seems to be little anxious to put its house in order by the establishment of a Press Council, and good taste has never been an obvious characteristic of that class of newspaper which is prone to the type of " muck-raking " in question. Disinterested onlookers will certainly await the effect of these sections with some degree of apprehension.

(v) *Miscellaneous*

(a) *Slander of Title, Goods and other Malicious Falsehood*

Though generically outside the scope of the law of defamation, these torts were considered by the Porter Committee, and during the Committee stage of the Lever Bill it was thought fit to include an amending clause, now section 3 of the Act. Extending the distinction between permanent and impermanent defamatory statements, the section provides that an action will lie in these types of cases without proof of special damage if (i) it is calculated to cause pecuniary damage to the plaintiff and is published in writing or other permanent form *or* (ii) it is calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, trade

or business held or carried on by him at the time of the publication, no matter in what form the publication is made. Subsection 2 also provides that broadcast statements in either category will be treated as publication in permanent form and therefore actionable *per se*. This section does not radically alter the law since, in practice, the requirement of proof of special damage was very nominal in such cases, the court being usually satisfied with, say, proof of general loss of custom.

(b) *Limitation on privilege at elections*

Section 10 provides that neither in local nor national elections shall statements made by or on behalf of a candidate be deemed privileged merely because they are material to a question in issue in the election. It was claimed that this clause was necessary to clarify the doubt which had arisen as a result of *Braddock* v. *Bevins* [1948] 1 All E.R. 450. This case involved a defamatory statement contained in the election address which was issued by a candidate in a local election and circulated to persons whose names were on the electoral register. There was no doubt that such a statement might be covered by the defence of fair comment, but Lord Greene M.R. went further and said it was also covered by qualified privilege, on the ground that there was a common interest between the candidate and the electors. Section 10 of the Act makes it clear that such is not now the law.

(c) *Agreements for indemnity*

Section 11 expressly confirms the validity, hitherto doubted, of agreements by one person to indemnify another against civil liability for libel, unless at the time of the publication the person indemnified knows the matter is defamatory and does not reasonably believe that there is a good defence to any action brought upon it. Such indemnity agreements include not only ordinary insurance policies, but also the usual agreement between an author and his publisher whereby the author agrees to protect the publisher against libel actions in respect of the publication.

(d) *Evidence of damages already recovered and consolidation*

The newspaper privilege, conferred by section 6 of the 1888 Act, of pleading in mitigation of damages that the plaintiff has already obtained redress in respect of words to the same effect, is extended by section 12 of the Lever Act to all defendants in both libel and slander actions. Likewise the power of consolidation of actions, confined to libel actions by section 5 of the 1888 Act, is extended by section 13 of the instant Act to actions of slander, slander of title, slander of goods and other malicious falsehood. It does not, however, permit the consolidation of actions in different categories, for example, the consolidation of an action for slander with one for malicious falsehood.

Eric C. E. Todd.

The Intestates' Estates Act, 1952

It could once be said that statutes governing succession were among the longest lived. The Statute of Distribution, even though, according to Maitland, it made for the intestate the sort of will that no sane testator would ever make, lasted, with minor amendments, for over two hundred and fifty years. Yet the Administration of Estates Act, 1925, has barely been able to survive a tenth of that time without major amendment. The difference in life can scarcely be due to the defects of the Act of 1925. It could be attributed to the reforming zeal of this generation, were there not many other branches of private law in much greater need of reform. It would also be tempting, since most of the amendments refer to the position of the surviving spouse, to attribute the Act of 1952 to a new view of the family and to seek support for this in recent cases concerning the matrimonial home and matrimonial property. In truth, it seems that the real causes are much more mundane; the primary one might not unfairly be found in the housing shortage. The existing provision for the surviving spouse in many cases of intestacy made it impossible, in view of the high price of houses, to avoid a sale of the matrimonial home, which in itself caused a loss to the estate by forfeiting the benefit of the "Chancellor's concession" [1] for estate duty purposes. Subsidiary causes are to be found in the changing value of money, which had greatly reduced the worth of the statutory legacy of £1,000, and in the inconveniences in administration of small life interests arising under the 1925 Act. If these are the causes of the move for reform, it is possible that the Act has gone further than they justify. In assessing the Act it will be convenient to deal separately with the main groups of provisions.

(1) *Amendments to the rules of succession.* These refer primarily to the position of the surviving spouse. The Act has left untouched the rules where there is no surviving spouse, but has radically altered the position where there is by adopting the recommendations of the Morton Committee.[2] If there is only a surviving spouse and no issue, parents, or brothers and sisters of the whole blood (or their issue) of the deceased the surviving spouse takes all to the exclusion of any relatives of the deceased. If in addition to the widow [3] there are issue who survive, the widow takes, as well as the personal chattels, the sum of £5,000 with interest at 4 per cent. and a life interest

[1] *i.e.*, the concession allowing valuation at 1939 values where a near relative of the deceased was resident in his house at the date of his death, and continues so to reside. (See the Extra-Statutory Concessions in the Report of the Commissioners of Inland Revenue, 1950, Cmd. 8103.)

[2] Report of the Committee on the Law of Intestate Succession, 1951 (Cmd. 8310).

[3] Although the word "widow" is used hereafter instead of the cumbrous phrase "surviving spouse" it must be remembered that the Act applies equally to a "widower." A spouse of one sort must be chosen to avoid undue difficulties with personal pronouns, and since the widow was mainly in the mind of the Committee she has been taken as the representative of surviving spouses.

in half the residue; the reversion on that and the immediate interest on the other half being held on the statutory trusts for the issue. If the issue fail to take a vested interest then the widow will take under the first rule. Where the deceased leaves no issue, but a widow and either parents, or brothers and sisters of the whole blood or the issue of deceased brothers or sisters, the widow takes the personal chattels, the sum of £20,000 and one half of the residue absolutely, the other half being held either for the parents absolutely, or, if none, on the statutory trusts for the brothers and sisters of the whole blood. Again, should they fail to take a vested interest under the trusts the widow takes all under the first rule. In order to appreciate the practical effect of these provisions the figures given by the Morton Committee must be remembered, namely that 87 per cent. of estates of all deceased persons were under £5,000, and it must also be remembered that the larger the estate, the less likely an intestacy. Hence the £5,000 statutory legacy will entirely exhaust the great majority of estates, particularly when it is remembered that it comes out of the estate after estate duty, administration expenses, and the wide class of personal chattels have been deducted. It is, therefore, probable that it is only where the estate is well over £6,000 gross that issue of a married intestate can have any interest at all, and it will need to be very considerably over before that interest will amount to much. As to the case where there are no issue, the likelihood of relatives sharing on an intestacy is small. Estates over £20,000 are well under 10 per cent. of all estates, and most will be governed by wills, and with the proportionately higher value of personal chattels in, and higher rates of duty chargeable on, such estates, the margin over £20,000 before the relatives will be much interested must be considerable.

The results of this situation may be unhappy. In cases where there are issue it means that most frequently the issue will be entirely dependent on the goodwill of the widow. That perhaps does not matter so much where they are her children by birth or adoption, but where they are not, as for example issue of a previous marriage, the situation can be unjust and unhappy. On the face of it this objection could be met by pointing to the extension, under the Act of 1952, of the Inheritance (Family Provision) Act, 1938, to intestacies. But where the widow receives more than two-thirds of the income of the net estate no application can be made by her issue. That rule will therefore prevent any application in the first case, but not in the second. It seems likely, therefore, that applications under the 1938 Act may be both frequent and justified where the intestate has been twice married. If so, small estates will frequently have to bear the costs of litigation or of negotiating a settlement. Even this relief is partial since the category of "dependants" excludes some for whom the deceased might reasonably have made provision, such as the son who, though of age, and fit, is still in the middle of his training. The second unhappy result of

the increased statutory legacy is that where the widow is elderly, so that the funds pass fairly quickly through her estate to the children, double duty will have been payable when it might have been avoided. The new provisions will certainly avoid many small life interests, but possibly this has been achieved at too great cost to the children.

In cases where there are no issue the change is greater. The new law appears to be founded upon the assumption that a testator would regard his widow as his "family" to the exclusion even of close blood relations such as parents, brothers or sisters. It is an assumption which seems hardly to be borne out by the figures of the Intestacy Committee, since in estates over £5,000 only 45 per cent. of testators left the whole or the bulk of their estate to their surviving spouse, and it seems reasonable to believe that the larger the estate, the fewer the testators who make this arrangement. While it may be right that the widow should enjoy the estate during her life, once the £5,000 limit is passed there is much less objection to a life interest, particularly in view of the new redemption arrangements, and the law might reasonably have made provision for returning the husband's estate after the widow's death to his kin rather than to his widow's or those whom she prefers. Again, perhaps the new arrangements are overgenerous to the widow. Certainly, however, the immediate absolute interest in half the ultimate residue to the parents is welcome, since they would rarely have lived to enjoy their former rights in possession; though, as has been pointed out, the cases where this interest will be substantial are few. It will be noticed that in respect of this residue the Act prefers the absolute claim of the widow to claims of brothers and sisters of the half-blood or uncles and aunts. There is no doubt justification for excluding remote relations, first cousins once removed and the like, but again it is arguable that the line has been drawn too narrowly in favour of the widow.

In addition to these amendments to the classes of intestate successors there are important general amendments. Chief among these is section 1 (4) inserting a new subsection in section 46 of the A.E.A. and providing that in cases of intestacy where, as between husband and wife, the order of death is uncertain, section 184 of the L.P.A. 1925 shall not apply, and instead the wife or husband, as the case may be, shall be deemed not to have survived, so that the estate of each will be distributed as if he or she were the survivor. This provision will, it seems, by reason of the wording of section 49 of the A.E.A. and the definition of an "intestate," apply also to interests not effectively disposed of by will. In cases of partial intestacy there may therefore be different rules as to survivorship, section 184 of the L.P.A. applying to the property comprised in the will, and being inapplicable to the property which is not—a result

which is curious, since the only merit of either rule lies in the consistency of its application.[4] On partial intestacies there is a welcome amendment to section 49 of the A.E.A. causing the surviving spouse to bring into account (though only as against the statutory legacy) any beneficial interest received under the will, and thus removing a defect of the 1925 Act, perhaps at the cost of somewhat difficult calculations. It is curious though that, as worded, the amendment has cast a duty on the personal representatives to employ wherever necessary a qualified valuer to determine the value of interests received under the will by the surviving spouse, but has not imposed a like obligation in respect of interests taken by issue. The Act also makes clear that the obligation to account does not extend to interests acquired under the will by reason of a testamentary exercise of a special power, thus bringing the position into line with appointments *inter vivos* (see *Re Reeves* [1935] Ch. 110). Finally there are under this head minor and drafting amendments to the 1925 Act, one charging interest on the statutory legacy primarily on income, another making clear that references to not leaving a member of any class of relative are to not leaving any member who, under the statutory trusts attains a vested interest, a matter not dealt with in the A.E.A. except as to issue.

(2) *Right of a surviving spouse to have her life interest redeemed.* Objections to the Act under the former head are largely on matters of principle. Under this and the following head objection can be less readily raised on that score, but more can be raised on drafting. A new section 47A of the A.E.A. confers on the surviving spouse a right to have any life interest arising on intestacy redeemed. Rules for valuing the life interest provide for a notional conversion of the estate into 2½ per cent. Consols, and purchase of an annuity equivalent to the income on that investment. Variations are made where the tenant for life is over eighty. The tenant for life must elect within twelve months from the time when the grant was first taken out, subject to discretionary extensions, and once made the election is irrevocable save with the consent of the personal representatives. The power is only exercisable in respect of interests in possession, which expressly exclude cases where a will has created a life interest, but has failed to dispose of the reversion and hence has caused a partial intestacy as to the ultimate interest. This new right is undoubtedly a useful one which will simplify administration. The main difficulty is that although the rules provide for a method of valuation, they do not (except where the tenant for life dies after electing and before effect is given to the election) provide for a date of valuation, which may when the estate consists mainly of shares be a matter of some importance.

[4] The other possible interpretation—that the new rule applies in all cases of partial or total intestacy to the whole estate—can produce equally inconvenient results since as *Re McKee* [1931] 2 Ch. 145 shows a partial intestacy need not be immediately apparent.

(3) *Rights of the surviving spouse in respect of the matrimonial home.* This right is again a new and important one, additional to the power of appropriation under section 41 of the A.E.A. The right is that of the widow to have any interest of the intestate in a dwelling-house in which she was resident at the time of the intestate's death and which is comprised in his residuary estate appropriated in or towards satisfaction of her claims. It is a right subject to considerable reservations. First, it cannot prejudice any specific devise, and hence may well not be exercisable in a partial intestacy. Next it can only be appropriated in satisfaction of an absolute interest of the widow (including the capital value of a redeemed life interest). Further it does not apply to a short leasehold interest which will or could be determined within two years from the date of death, though in respect of many of such interests the right of appropriation will be irrelevant, the widow being able to rely on the right to reside given her by the Rent Restriction Acts, the exercise of which will not diminish her interest on the estate. A part of a building occupied as a separate dwelling is a house for the purpose of the Act; one wonders whether all the subtleties of separateness in this connection have yet been explored. There is also room for doubt as to the position where the house is held by husband and wife as tenants in common.[5] Further, where the dwelling-house is held with agricultural land, or forms part of a larger building comprised in the residuary estate, or where part of it was used as a hotel or lodging house or for purposes other than domestic, the right cannot be exercised unless the court is satisfied that to do so will not diminish the value of the estate or make realisation more difficult. It seems that an application to the court is essential, which is in itself unfortunate, and the scope of this limitation is wide. Is not for instance part of a dwelling-house used for other than domestic purposes if a room has been claimed as an office or study for the purposes of tax relief? The right must be exercised within twelve months from the grant, but it seems that a purchaser meanwhile is protected. A greater difficulty is that the position of a widow who is sole personal representative is not clear. It seems probable (though not certain) that the right can be exercised in such circumstances, but whereas the rule against a trustee purchasing trust property is expressly waived where the widow is one of the personal representatives, there is no exemption where she is the sole one. This may cause difficulty since the appropriation may be made in satisfaction of an interest under the will or intestacy coupled with a cash payment to make up the balance where the value of the

[5] In such cases it is arguable that the husband has no interest in a dwelling-house, but merely an interest in the proceeds of sale; see cases such as *Edwards* v. *Hall* [1949] 1 All E.R. 362 or *Parker* v. *Rosenberg* [1947] K.B. 371. It is true that the argument is technical, but since it has been raised in other cases it might well have been foreseen here.

interest is less than that of the house, a transaction clearly resembling a sale, whatever be the position as to a straight appropriation.

(4) *Amendments to the Inheritance (Family Provision) Act*, 1938. Here the amendments are least contentious and most clear. The 1938 Act is extended to total and partial intestacies, the limits of one-half and two-thirds the income of the net estate are abolished, the whole income being available to dependants, though the capital cannot be touched, except in small estates, where straight capital payments are now allowed. The sole relic is the rule excluding applications on behalf of children of a spouse who receives two-thirds of the income of the net estate. Although this can be inconvenient, it can stop an application by children where the widow gets two-thirds of the income even though the circumstances of the family are such that otherwise the whole income might be diverted to them, its retention is probably justified in the cause of preventing family disputes. The difficulties of *Re Bidie* [1949] Ch. 121 are to a large extent removed by giving a discretion to extend the six-month period when it would operate unfairly because of "a question whether a person had an interest in the estate or as to the nature of his interest not having been determined at the time the grant was first taken out," or where a later will is discovered, or it is otherwise reasonable. The first head will, it seems, cover either matters of construction or cases, *e.g.*, where the legitimacy of a child was not then determined. The provisions as to small estates are extended to estates up to £5,000 and the intricate calculations of *Re Catmull* [1943] Ch. 262 are excluded. All these are useful amendments; the only regret is that others were not included. The condition of the domicile of the deceased has been much criticised and might have been amended, the question of whether an order can be made in favour of a dependant who has witnessed the will because of the combined effects of section 15 of the Wills Act, and section 3 (1) of the Act of 1938, has been raised, and might well have been covered, as might have been the position of contracts and settlements attempting to evade the Act by reducing the net estate. Nevertheless as it now stands the Act of 1938 is a much improved and simplified statute, and the reasonable softening of the rigid rules on intestacy is welcome.

Finally, the legislative history of the Act is worth comment. The Report on which it was based was received with no great enthusiasm; on its first introduction into the Commons it was counted out, a circumstance which does not necessarily reflect the feeling of the House, but on that occasion it is noticeable that even some of the sponsors of the Bill were critical of it. On its second introduction it fared better, passing through the Commons with relatively little comment. It was only in the House of Lords that it was really reviewed in detail and a much-improved Bill resulted. On such matters the use of the quieter House is outstanding, even though in the present case there is left a suspicion that despite this review the

new law places a premium on testate succession, and arguments as to its provisions, rejected in the debates on the Bill, may still prove an incentive to will-making.

J. D. B. Mitchell.

Corrigenda

In the January number of the M.L.R. a note was published on the *Straffen Case* in which the following passage from the report in *The Times* newspaper of the learned judge's summing up to the jury was given :

> " If they (the jury) were satisfied that it was Straffen's hand that brought life to an end, then their verdict would be one of guilty of murder. The jury should then go on, if that was their conclusion, to ask themselves whether they were satisfied by the defence that at the time Straffen was insane within the meaning of the criminal law."

and was criticised (at p. 75) in the following terms :

> " Such language could give only one impression to the jury—that the burden on the defence was as heavy as that on the prosecution."

Reference to the transcript of the summing up however shows that the report in *The Times* was incomplete, in that it did not give the following important passage :

> " If you are satisfied that the prisoner killed Linda Bowyer, and only if you are satisfied of that, the second issue in this case then calls for your consideration. You have been asked that if you should be satisfied that it was this man who killed that little girl, you should bring in a special verdict founded upon the alleged insanity of the prisoner at the time. Here I have to tell you that the burden, or the onus, is upon the defence; that burden would be discharged if they satisfied you that he was insane, and be discharged if they satisfied you that he probably was insane; for where the burden rests upon the defence, the law says that that burden is not so heavy as it is when the burden rests upon the prosecution. If the defence has satisfied you that he probably was insane at the time, why then your verdict will be one of a special verdict which I will explain to you in a moment. It is generally put into three words : ' guilty but insane.' But observe, and indeed I say this in all seriousness, that in each case the word is ' insane.' You must not leave out of your consideration when you are coming to deal with this side of this case that important word."

It will be observed that the learned judge did in fact make it clear to the jury that the burden on the defence is not as heavy as that on the prosecution. We wish to express our profound regret that this unfounded criticism should have appeared in the *Review*.

* * * * * *

We also wish to express regret for an error that appeared in the same number at the end of the review of Raphael Powell's *Law of Agency*. The date of publication of this book was in fact printed on the reverse of the title-page.

RECENT PERIODICAL LITERATURE

(1) *General.* H. Coing: "Tendencies in Modern American Legal Philosophy: a Survey" 40 Georgetown L.J. 523. J. E. Harpster: "Religion, Education and the Law," 36 Marquette L.R. 24. D. G. Kilgour: "The Rule Against the Use of Legislative History: Canon of Construction or Counsel of Caution?" 30 Can.B.R. 769. L. Loevinger: "An Introduction to Legal Logic," 27 Indiana L.J. 471. F. S. C. Northrop: "Obstacles to a World Legal Order and their Removal," 19 Brooklyn L.R. 1. S. Timberg: "The Decline and Renaissance of Economic Liberties," 47 Northw.U.L.R. 147.

(2) *Constitutional Law.* J. P. Frank: "Can Courts Erase the Colour Line?" 2 Buffalo L.R. 28. L. B. Lea: "The Steel Case: Presidential Seizure of Private Industry," 47 Northw.U.L.R. 289. E. McWhinney: "The Union Parliament, the Supreme Court and the 'Entrenched Clauses' of the South Africa Act," 30 Can.B.R. 692. P. B. Perlman: "On Amending the Treaty Power," 52 Col.L.R. 825. E. V. Rostow: "The Democratic Character of Judicial Review," 66 Harv.L.R. 193.

(3) *Administrative Law.* C. R. Cutler: "The Post Office Department and the Administrative Procedure Act," 47 Northw.U.L.R. 72. R. F. Fuchs: "Judicial Control of Administrative Agencies in Indiana," 28 Indiana L.J. 1. J. A. G. Griffith: "Public Corporations as Crown servants," 9 U. of Toronto L.J. 169; "Management Interest: a Real or a False Defence?" 5 Stanford L.R. 110. J. D. B. Mitchell: "The Treatment of Public Contracts in the United States," 9 U. of Toronto L.J. 194. S. A. Riesenfeld: "Judicial Control of Administrative Action by Means of the Extraordinary Remedies in Minnesota: 6 Quo Warranto," 37 Minn.L.R. 1.

(4) *Family Law* A MacDonald: "French Law of Marriage and Matrimonial Regimes," 1 Int. and Comp.L.Q. 313.

(5) *Law of Property and Succession.* W. J. Derenberg: "The Impact of the Anti-trust Laws on Trade-marks and Foreign Commerce," 27 N.Y.U.L.R. 414. G. B. Graham: "The Intestates' Estates Act, 1952," 16 Conv.(N.S.) 402. G. B. Graham: "The Order of Application of Assets," 16 Conv.(N.S.) 257. R. C. and T. C. Sorensen: "Re-examining the Traditional Legal Test of Literary Similarity: a Proposal for Content Analysis," 37 Cornell L.Q. 638.

(6) *Law of Contract.* A. L. Goodhart: "The Imaginary Necktie and the Rule in *Re Polemis*," 68 L.Q.R. 514. J. J. Gow: "Mistake and Error," 1 Int. and Comp.L.Q. 472. H. Newman: "The Doctrine of Cause or Consideration," 30 Can.B.R. 662. R. S. Stevens: "Ethics and the Statute of Frauds," 37 Cornell L.Q. 355. S. J. Stoljar: "The Ambiguity of Promise," 47 Northw.U.L.R. 1.

(7) *Law of Tort.* H. R. Baer: "The Relative Roles of Legal Rules and Non-Legal Factors in Accident Litigation," 31 N.Car.L.R. 1. S. S. Bobbé: "Tort Liability of Hospitals in New York," 37 Cornell L.Q. 419. D. P. Derham: "Conversion by Wrongful Disposal as Between Co-owners," 68 L.Q.R. 507. M. L. Garon: "Recent Developments in California's Last Clear Chance Doctrine," 40 Calif.L.R. 404. A. L. Goodhart: see (6). F. James, Jr.: "Social Insurance and Tort Liability: The Problem of Alternative Remedies," 27 N.Y.U.L.R. 539. G. D. Lambdin: "Studies in the Law of Torts: a Review," 30 Texas L.R. 714. R. A. Leflar: "Negligence in Name Only," 27 N.Y.U.L.R. 564. C. Morris: "Hazardous Enterprises and

Risk Bearing Capacity," 61 Yale L.J. 1172. F. F. Stone: "Tort Doctrine in Louisiana: the Concept of Fault," 27 Tulane L.R. 1.

(8) *Commercial Law.* "Agricultural Co-operatives: a Symposium," 27 Indiana L.J. 353. W. J. Derenberg: see (5).

(9) *Industrial Law.* "Agricultural Co-operatives," see (8). J. T. McKelvey: "Legal Aspects of Compulsory Arbitration in Great Britain," 37 Cornell L.Q. 403. J. T. McKelvey: "Trade Union Wage Policy in Post-war Britain," 6 Ind. and Lab.Rels.Rev. 3. F. James, Jr.: see (7). C. M. Schmitthoff: "The Rule of Law in Industrial Relations," 7 Indust.L.R. 84. W. W. Schwarzer: "Wages During Temporary Disability, etc.," 5 Stanford L.R. 30. C. W. Summers: "Judicial Review of Labour Arbitration or Alice Through the Looking Glass," 2 Buffalo L.R. 1.

(10) *Law of Evidence.* Z. Cowen: "The Admissibility of Criminal Convictions in Subsequent Civil Proceedings," 40 Calif.L.R. 225.

(11) *Civil Procedure.* A. P. Sereni: "Basic Features of Civil Procedure in Italy: a Comparative Study," 1 Am.J. of Comp. L.373.

(12) *Criminal Law and Procedure.* E. Pepler: "The Juvenile Delinquency Act, 1929," 30 Can.B.R. 819. F. J. Remington and O. C. Helstead: "The Mental Element in Crime: a Legislative Problem," 1952 Wis.L.Rev. 644. G. L. Williams: "Common-law Misdemeanours," 68 L.Q.R. 500.

(13) *Conflict of Laws.* C. H. Alexander: "International Law in India," 1 Int. and Comp.L.Q. 289. G. W. Bartholomew: "Private Interpersonal Law," 1 Int. and Comp.L.Q. 325. E. E. Cheatham and W. L. M. Reese: "Choice of the Applicable Law," 52 Col.L.R. 959. G. R. Delaume: "Jurisdiction over Crimes Committed Abroad: French and American Law," 21 George Wash.L.R. 173. W. J. Derenberg: see (5). H. Kronstein: "The Nationality of International Enterprises," 52 Col.L.R. 983. W. H. McBratney: "Jurisdiction versus 'Choice-of-Law' in Divorce Actions," 25 Rocky Mount L.R. 51. K. H. Nadelmann: "Conflicts Provisions in the American Bankruptcy Act," 1 Int. and Comp.L.Q. 484. E. D. Re: "The testamentary Disposition of Land in the Conflict of Laws," 27 St. John's L.R. 36. J. A. C. Smith: "Capacity in the Conflict of Laws," 1 Int. and Comp.L.Q. 446. J. A. C. Smith: "Eastern Marriages in English Law," 1 Int. and Comp.L.Q. 301. R. E. B. Totterman: "Functional Basis of the Rule *Locus Regit Actum* in English Conflict Rules," 2 Int. and Comp.L.Q. 27.

(14) *International Law.* C. H. Alexander: see (13). C. H. Alexander: "The Quasi-Judicial Function in Recognition of States and Governments," 46 Am.J.Int.L. 631. H. Aufricht: "Supersession of Treaties in International Law," 37 Cornell L.Q. 655. G. R. Delaume: see (13). J. Evensen: "The Anglo-Norwegian Fisheries Case in its Legal Consequences," 46 Am.J.Int.L. 609. G. G. Fitzmaurice: "Reservations to multilateral conventions," 2 Int. and Comp.L.Q. 1. N. Hill: "Law and Practice of the United Nations on the Calling of Conferences," 41 Georgetown L.J. 1. H. F. Holland: "The Juridical Status of the Continental Shelf," 30 Texas L.R. 586. B. MacChesney: "International Protection of Human Rights in the United Nations," 47 Northw.U.L.R. 198. F. E. Maloney: "Injunction Without Sanction: the Iranian Fiasco," 27 Indiana L.J. 333. G. Manner: "The Object Theory of the Individual in International Law," 46 Am.J.Int.L. 428. S. D. Metzger: "The Liberal Japanese Peace Treaty," 37 Cornell L.Q. 382. D. P. O'Connell: "A Reconsideration of the Doctrine of International Servitudes," 30 Can.B.R. 807. W. J. Wagner: "Is Compulsory Adjudication of International Legal Disputes Possible?" 47 Northw. U.L.R. 21. H. Kronstein: see (13).

W. A. Steiner.

NOTES OF CASES

Matrimonial Home—Recent Cases

The evolution of the right to occupy the matrimonial home, accorded to the spouse who is not the owner or legal tenant of the premises, has been very fully discussed from the point of view of property law, especially by Mr. George ("Disputes over the Matrimonial Home" (1952) 16 *Conveyancer* 27), by Mr. H. W. R. Wade ("Licences and Third Parties" (1952) 68 L.Q.R. 337), by Mr. Megarry ("The Deserted Wife's Right to Occupy the Matrimonial Home" (1952) 68 L.Q.R. 379), and by Dr. Cheshire ("A New Equitable Interest in Land" (1953) 16 M.L.R. 1). The purpose of this Note is to survey some recent cases, and to do so chiefly from the point of view of matrimonial law.

The problem is usually put in terms of the rights of a deserted wife to occupy the house owned or rented by her husband, but the question might just as well arise in the reverse situation, *i.e.*, where the wife was the owner or tenant and had deserted the husband. Doubts concerning the answer derive, inter alia, from certain observations of Denning L.J. in *Bendall* v. *McWhirter* [1952] 2 Q.B. 466; [1952] 1 All E.R. 1307, who at p. 1311 linked the deserted wife's right to occupy the matrimonial home with her common law authority to pledge her husband's credit. The principal argument, however, on which the right to occupy the matrimonial home rests is that the deserted wife is in enjoyment of an irrevocable contractual licence and this argument would also meet the reverse situation, in spite of the fact that section 12 of the Married Women's Property Act, 1882, applies unequally between the spouses. Moreover, doubts may be expressed as to whether the rationale of the decisions about to be discussed is restricted to cases of desertion, *i.e.*, to cases in which there has been misconduct on the part of the spouse legally entitled to the premises and whether it should not also apply to cases of factual or judicial separation. This question, however, must be left open for the moment, and the following observations will be confined to the actual situation which has now been before the courts so frequently, that of the right of a deserted wife to remain in occupation of the matrimonial home.

The deserted wife's right against her husband must of course be clearly distinguished from her rights against third parties. The problem of the rights of husband and wife *inter se* has been raised anew in the recent cases of *Murcutt* v. *Murcutt* [1952] P. 266; [1952] 2 All E.R. 427 and of *Vaughan* v. *Vaughan* [1953] 1 All E.R. 209. In *Murcutt* v. *Murcutt* husband and wife lived in the matrimonial home, of which the husband was the tenant. Their two grown-up

daughters, one of whom was an invalid, were residing with them. The wife had petitioned for divorce by reason of the husband's cruelty. He instituted proceedings in the county court in order to evict the wife and the two daughters. Subsequently he withdrew the application against the wife and undertook not to evict her. The wife alleged that the application against the daughters was really aimed at her because if the daughters, and especially if the invalid daughter went, she would be compelled to go as well, the invalid being dependent on her help. She therefore sought to obtain an injunction against her husband restraining him from proceeding with the application against the daughters. Willmer J., in the Probate, Divorce and Admiralty Division, held that he had jurisdiction to grant the injunction, but refused to make it, inter alia, on the ground that the wife was not legally under any obligation to follow the daughters and that if such an order was made there could be no visible limit to the possibility of protecting the occupation of third parties of whom the wife was fond and who might be dependent on her. In so far as any general conclusions can be drawn from this decision, they would appear to be that the rights of the wife against the husband with regard to the matrimonial home cannot possibly enure for the benefit of third persons, except, one must assume, infant children.

The point in *Vaughan* v. *Vaughan* was simple, and, one would have thought, obvious: the wife's right to occupy the matrimonial home is a *jus maritale*, *i.e.*, based on the fact that she is the owner's or the tenant's wife. Hence her right terminates with termination of the marriage, *e.g.*, by divorce. After divorce the husband may revoke the licence except where he has by contract bound himself not to do so. In the instant case he deserted his wife in 1948 and told her she could " always " live in the matrimonial home. She divorced him in 1950, and when, in 1952, he revoked the licence, she argued that " always " meant for the duration of her life. However, the Court of Appeal (Evershed M.R., Denning and Romer L.JJ.) unanimously held that the husband's remark could not possibly be construed as disclosing a contractual intention, quite apart from the question of consideration which was expressly left open. Denning L.J. pointed out that if a contractual licence had been established it would have been a post-nuptial settlement capable of being varied under section 25 of the Matrimonial Causes Act, 1950. Romer L.J. reached the conclusion that a wife in enjoyment of an irrevocable licence for life (if it was in writing) would have the powers of a tenant for life within the meaning of the Settled Land Act and could sell the premises. He did not consider the question whether, by section 20 (1) (vi) of the Settled Land Act, 1925, the wife does not have these powers even if her right is liable to cease on the termination of the marriage.

That the deserted wife's right to occupy the matrimonial home may be available against a third party was, as will be remembered,

at first established in cases arising under the Rent Restriction Acts. The gist of these cases (*Brown* v. *Draper* [1944] K.B. 309; *Old Gates Estates* v. *Alexander* [1950] 1 K.B. 311; *Middleton* v. *Baldock* [1950] 1 K.B. 657) was that, as a tenant of rent-controlled premises, a deserting husband continues to be in possession through his wife, that he cannot, even by an arrangement with the landlord, give the latter the right to evict her, and that he cannot revoke the licence he has given her to occupy the matrimonial home, not, at any rate, as long as she is not guilty of matrimonial misconduct. In *Wabe* v. *Taylor* [1952] 2 Q.B. 735; [1952] 2 All E.R. 420, the Court of Appeal (Somervell, Birkett and Hodson L.JJ.) had to deal with a case in which the deserted wife had committed adultery, but there was no evidence that the husband had revoked her licence to occupy the rent-controlled premises of which he was the tenant. The court left the question open, whether he could have withdrawn the licence and thus given the landlord the right to evict the wife. In any event, as long as this had not happened, the landlord was not entitled to plead the wife's matrimonial misconduct and thus not entitled to evict her. The husband remained through her in possession of the rent-controlled house.

The principal problem is whether the wife's right is an equitable interest in the land, a *jus in rem*, binding third parties with the exception of bona fide purchasers for value. Roxburgh J. in *Thompson* v. *Earthy* [1951] 2 K.B. 596; [1951] 2 All E.R. 235, answered the question in the negative and declared himself to be unwilling to create a novel kind of equitable interest, but the report does not show whether the plaintiff had bought with or without notice of the wife's presence in the house. On the other hand, both in *Lee* v. *Lee* [1952] 2 Q.B. 489; [1952] 1 All E.R. 1299 and in *Errington* v. *Errington* [1952] 1 K.B. 290; [1952] 1 All E.R. 149, Denning L.J. expressed the opposite view.

One might have thought that this question had been settled by the decision of the Court of Appeal in *Bendall* v. *McWhirter* [1952] 2 Q.B. 466; [1952] 1 All E.R. 1307, and by that of Jones J. in *Ferris* v. *Weaven* [1952] 2 All E.R. 233, but the case of *Hole* v. *Cuzen* [1953] 1 All E.R. 87, reported after Dr. Cheshire had delivered the lecture printed in the January issue of this *Review*, shows that the situation is as problematical as ever. It reveals a conflict of opinion on a fundamental problem of law and a state of uncertainty which, it is submitted, ought to be terminated at the earliest possible moment either by a decision of the House of Lords or by statute. Some may feel that it reveals the need for an appeal to the highest court by a public authority "*dans l'intérêt de la loi.*"

The nature of the deserted wife's right to occupy the matrimonial home is no longer in doubt. It is that of a licensee occupying by virtue of a licence indistinguishable from a contractual licence and irrevocable by the husband as long as the marriage lasts and she is not guilty of matrimonial misconduct,

but revocable by an order of the court under section 17 of the Married Women's Property Act, 1882. This was laid down in *Bendall* v. *McWhirter* by a unanimous Court of Appeal, and no doubt was thrown on this proposition in *Hole* v. *Cuzen*. This right is based on the marriage itself. In *Bendall* v. *McWhirter* this right was held to bind the husband's trustee in bankruptcy.

So much is clear, but the question is: why did the Court of Appeal refuse to grant the trustee in bankruptcy the order for the possession of the matrimonial home which he claimed against the debtor's wife? Was it because her licence is an equitable interest which is in the nature of a *jus in rem* and binds all third parties except a bona fide purchaser for value? Or is her right a pure *jus in personam* against the husband, which however binds the trustee in bankruptcy who "stands in the shoes" of the bankrupt? Or was it perhaps because, as an officer of the court, a trustee in bankruptcy is bound by special moral duties (see *per* James L.J., in *Ex p. James* (1874) 9 L.R. Ch.App. 609, 614)? Is *Bendall* v. *McWhirter* based on the nature of the licence *jure maritali* as an equitable interest or is it based on the law of bankruptcy?

Romer L.J. (with whom Somervell L.J. agreed) refused to commit himself to the view either that she had or that she had not such "enforceable equity which operated as a bar to the plaintiff's (*i.e.*, the trustee in bankruptcy's) claim" (p. 1316). He based his decision in favour of the wife on the rule (p. 1317) "that a trustee takes no better title to the property than the bankrupt had" that (p. 1316) the wife's licence subjected the debtor's right of dealing with the property to a "clog or fetter," that "there was, accordingly, to this extent a restriction on his beneficial ownership of the property," and that the trustee could not acquire a larger beneficial interest than that which the debtor had enjoyed.

Denning L.J., on the other hand (at pp. 1312–1315) took the view that, as holder of an irrevocable licence, the wife had an equitable interest, and this for reasons similar to those developed by Dr. Cheshire in his article in the January number of this *Review*.

Is the difference between Romer L.J. and Denning L.J. merely one of formulation or is it a difference in substance? Before the decision of the Court of Appeal in *Hole* v. *Cuzen* the present writer would have been inclined to say that if the trustee's title was bound by a "clog or fetter," the licensee's right which thus encumbered the trustee's title must be of a proprietary and not merely of a personal character. He would have felt that Romer L.J. had in different words said exactly the same thing as Denning L.J., namely, that the wife had an equitable interest which bound all third parties except a bona fide purchaser for value, because, if it was merely personal or "contractual" it would not have affected the trustee's right to recover the property. Consequently what was laid down in *Bendall* v. *McWhirter* as regards the trustee in bankruptcy would have been equally true of a mortgagee or of

a purchaser other than a purchaser for value in good faith. This view of *Bendall* v. *McWhirter* was clearly taken by Jones J. in *Ferris* v. *Weaven*, where a mala fide purchaser of the property failed with an action for possession against the vendor's deserted wife who was in occupation. It is true that the transaction between the husband-vendor and the purchaser was obviously collusive and aimed solely at ousting the wife from the home, but one does not get the impression that the learned judge decided the case on this ground. He based himself firmly on *Bendall* v. *McWhirter* and even tried (not very convincingly) to distinguish *Thompson* v. *Earthy* which, on the view that *Bendall* v. *McWhirter* was decided on the ground that the wife had an equitable interest, would have to be regarded as implicitly overruled by that case unless it can be justified by the fact of the purchaser's bona fides.

All this, however, has been shattered by *Hole* v. *Cuzen*. In that case the tenant of rent-controlled premises had paid more than the statutory rent and consequently, by section 14 (1) of the Increase of Rent and Mortgage Interest (Restriction) Act, 1920, acquired the right to reclaim the excess from the landlord and to deduct this overpayment from his current rent. The Court of Appeal (Somervell, Jenkins and Hodson L.JJ.) held that he was entitled to make this deduction against a claim for arrears of rent made by the landlord's trustee in bankruptcy. Now, section 12 (1) (*f*) of the 1920 Act says that the expression " landlord " includes a person " from time to time deriving title under the original landlord," and the court might have held that for this reason the tenant's claim for the overpayment was something like an incumbrance on the title of the landlord's successor whether trustee in bankruptcy, purchaser or mortgagee. This the court might have done, and if it had done it, the case would not have been mentioned here. But it did not. Jenkins L.J., who delivered the leading judgment, and with whose reasoning Somervell L.J., who had been a member of the court in *Bendall* v. *McWhirter*, expressed his agreement (p. 93), assumed for the purpose of his judgment that the tenant's right to the overpayment was a purely personal right against the landlord and did not bind his successor in title (p. 88). The court held that the trustee was bound by purely personal rights available against the debtor, and for this it relied on *Bendall* v. *McWhirter* as an authority. Jenkins L.J. quoted the judgment of Romer L.J. without mentioning that of Denning L.J. and said (at p. 91):

> " The right of the wife and the obligation of the husband there under consideration were a personal right and a personal obligation depending on the relationship of husband and wife which subsisted between these two parties. Yet, it was held that the trustee in bankruptcy could not disregard the wife's interest. That shows, I think, that, although it has been said in some cases that the trustee in bankruptcy is simply an assignee, like any other assignee, of all the property of the

bankrupt divisible among the creditors, that unqualified statement does not provide a universally adequate definition of the trustee's position, for, if it was an exhaustive and accurate definition of his position, the decision in *Bendall* v. *McWhirter* must, it seems to me, have gone the other way."

In other words: So far we have assumed that the trustee in bankruptcy was only bound by proprietary rights and that, since he was bound by the wife's licence to occupy the matrimonial home, that showed that this licence was an equitable interest. Denning L.J. in *Bendall* v. *McWhirter* argued on the line that the wife's right was of a proprietary character, that the trustee was bound by proprietary but not by personal rights, and that he was bound by the licence because it was proprietary. Jenkins L.J. presupposes that the wife's licence is purely personal, but argues that, since according to *Bendall* v. *McWhirter* it binds the trustee in bankruptcy, it must be clear that the trustee may be bound by purely personal rights. Consequently, according to Jenkins L.J. (who did not mention *Ferris* v. *Weaven*), it is axiomatic that the wife's licence does not bind an " assignee " of the legal estate other than the trustee in bankruptcy. " If the trustee was simply in the position of an ordinary assignee of the house, I should have thought there would be grave difficulty in seeing how there was any interest in the wife which could override his interest as assignee, for the husband's obligation to the wife was, as I have said, purely personal."

The apparent concordance of the judgments of Romer L.J. and of Denning L.J. was an illusion. The two views of *Bendall* v. *McWhirter* are irreconcilable. Such conflicts of interpretation are innocuous and even quite attractive as *jeux d'esprit* as long as no practical matters are involved. But what is here at stake is not only the borderline between *jura in personam* and *jura in rem* in English law, but the question whether the deserting husband can throw his wife out of the house by selling it to someone else, and, on the other hand, how far, in order to safeguard their titles, purchasers and mortgagees must pry into the matrimonial affairs of vendors and mortgagors. It is no good saying that *Hole* v. *Cuzen* had nothing to do with husband and wife and that what Jenkins L.J. said was *obiter dictum*. It was not. The Court of Appeal decided that a trustee in bankruptcy can be bound by personal rights and has thus knocked the bottom out of the interpretation given to *Bendall* v. *McWhirter* by Jones J. in *Ferris* v. *Weaven*. Implicitly it has re-established *Thompson* v. *Earthy*. There is a case for and a case against considering the irrevocable licence as a *jus in rem*. Someone is going to be hurt when the problem is solved, but all suffer if it remains unsolved.

O. Kahn-Freund *

* The writer acknowledges his indebtedness to his colleague, Dr. J. D. B. Mitchell, for his assistance on several points of property and bankruptcy law.

The Deserted Wife's Right to Pledge Her Husband's Credit for Necessaries

The trend of recent decisions on the law of husband and wife may perhaps be thought to favour the wife unduly at the expense of the husband. One might be excused, after such decisions as *Bendall* v. *McWhirter* [1952] 2 Q.B. 467 in entertaining a fear lest the courts, in their anxiety to remove the pristine disabilities which attached to a woman on her entering the married state, had not gone too far and made marriage legally as perilous an enterprise for the husband as it once was for the wife. It is reassuring, therefore, to see that, in one respect at least, the Court of Appeal has now adopted a narrow interpretation of the wife's rights. If the deserted wife, who once only had a right to pledge her husband's credit, now has a right, come what may (unless it be an order under section 17 of the Married Women's Property Act, 1882), to stay in his house, then it is natural to expect her right to pledge his credit for necessaries not to be extended further than the existing authorities warrant. This, in effect, is the outcome of the decision of the Court of Appeal in *Biberfeld* v. *Berens* [1952] 2 Q.B. 770.

The facts of the case were as follows. The wife left the husband in March, 1949, on account of his cruelty and in December, 1949, obtained a decree absolute of divorce on that ground. From March to December the wife lived with her sister, paying for her keep there out of an allowance of £5 per week made to her by her brother. The husband during this period made no financial provision for the wife. She had, however, property of her own, the bulk of which consisted of savings certificates worth £1,125 and jewellery which, at the wife's valuation, was worth £250. The brother now sought to recover from the husband £195, the total sum advanced to the wife while her husband made no provision for her. The Court of Appeal, upholding the decision of Lynskey J., rejected this claim on the ground that a deserted wife who has adequate means of her own is not entitled to pledge her husband's credit for necessaries.

This decision is amply justified from the point of both history and authority. As a matter of history there can be little doubt that the deserted wife's right to pledge her husband's credit for necessaries was due to her proprietary disability. While the common law allowed an infant to subject himself to liability—whether contractual or quasi-contractual—if he purchased necessaries, it could not allow a married woman to subject herself to such liability, for her proprietary disability precluded her from satisfying the liability. The third party could only get at such property as the wife may have had by suing the husband. Hence the common law invented the fiction that the deserted wife was her husband's agent for the purpose of buying necessaries. Pollock C.B. put the matter

in its correct historical perspective by saying: "it is not unreasonable to say she has an authority of necessity; for she has by law no property" (*Johnston* v. *Sumner* (1858) 3 H. & N. 261, 266). But *cessante ratione, cessat lex*: hence it was said in many cases that if the wife in fact had property, either in equity or from her earnings, she had no authority of necessity. (See the authorities cited in the judgment of Singleton L.J. in the present case, and especially dicta in *Johnston* v. *Sumner* (*supra*) and in *Bazeley* v. *Forder* (1868) L.R. 3 Q.B. 559.)

With regard to the wife's earnings, the common law sacrificed logic to common sense, for strictly any earnings of the wife's were her husband's property at law; even, it seems, if he deserted her. The theoretical difficulties arising from this situation are formidable. The authorities agree that if the wife had earnings of her own the third party who supplied her with necessaries could not sue her husband. If he sued the wife, could he be met with a plea of coverture? There is no immediately obvious reason why he could not. In *Wilson* v. *Ford* (1868) L.R. 3 Ex. 63 Kelly C.B. suggests that the wife "might have been . . . liable herself for some of the articles had she been possessed of any separate estate"—but this would not appear to cover the case of personal earnings. The lack of authority on the point seems to indicate that the problem was of more theoretical than practical importance. It seems to have been assumed that the wife in fact, if not in strict theory, had the means to satisfy the liability to the third party. Conversely, the wife's authority of necessity survived the abolition of her proprietary disability: the common law was as realistic in the case of the wife who in theory might have property but in fact had none as it was in the case of the wife who in theory could not, but in fact did, have property. When, however, the wife could both have property in theory and actually had property in fact, there was no justification either in theory or in common sense for continuing the fiction that she had authority of necessity. It might be noted that this line of approach had already been foreshadowed in *Rees* v. *Hughes* [1946] K.B. 517, where the Court of Appeal considered the impact of the removal of the wife's proprietary disabilities on the husband's liability to reimburse any person who paid for her funeral expenses, and reached the conclusion that there was now no such liability where the wife died leaving property of her own.

Certain problems, however, remain. The most important, from the practical point of view, is—when can a wife be said to have "adequate" means of her own? Means, it is conceived, are adequate if they are sufficient for the purchase of necessaries. Hence the inquiry is pushed back to the question—what, in this context, are necessaries? There are four possible answers: (i) things necessary to afford a bare subsistence, *i.e.*, necessities; (ii) things necessary according to the station in life of the husband;

(iii) things necessary according to the station in life of the wife; and (iv) things necessary to the style of living in the joint establishment before the desertion took place. Of these, the first view is too narrow. It is impliedly inconsistent with *Sandilands* v. *Carus* [1945] 1 K.B. 270, where the Court of Appeal held that a deserted wife does not lose her common law right to pledge her husband's credit for necessaries by obtaining a maintenance order against him from the justices; yet it would seem that the object of such an order is to supply her with the means of procuring the bare necessities of life. It is submitted therefore that where the wife has sufficient means only to supply her with the bare necessities of life she ought not merely on that account to lose her right to pledge her husband's credit. The second view is supported particularly by *Bazeley* v. *Forder* (*supra*) where a deserted wife who had means of her own which were not adequate for maintaining her according to her husband's degree was entitled to pledge his credit for reasonable expenses. This view seems to be a corollary of the principle that when a wife lives with her husband she can pledge his credit for goods necessary to the style of living fixed by the husband. This principle, in turn, was based on the rule that "The husband sustains the liability for all debts; he should therefore have the power to regulate the expenditure" (*per* Erle C.J. in *Jolly* v. *Rees* (1845) 15 C.B.(N.S.) 628, 641). The rule that the husband is liable for the wife's debts having been swept away, it is submitted that the whole basis of the second view is gone. The third view receives a certain amount of support from dicta. One example must suffice: "If a man without any justification turns away his wife, he is bound by any contract she may make for necessaries suitable to *her* degree and estate" (*per* Bayley J. in *Montague* v. *Benedict* (1825) 3 B. & C. 631, 635). But there seems to be no actual decision to support the third view. It has no greater intrinsic merit than the second view and must be rejected along with it. The fourth view seems, with respect, to be the most sensible. It was adopted by Lynskey J. in the present case, when he said that a husband was bound by law to afford his wife "means of support according to *their* situation in life." (quoted at page 776 of the report of the Court of Appeal decision). It derives implied support from the view expressed by Denning L.J. that a rich wife must bring her means into the "family pool" just as much as the husband. If this is so, the parties will presumably fix their style of living by consent. While there is little to be said for the proposition that a deserted wife should be held to a style of living imposed on her by her husband, there is everything to be said for the view that she should rest content with, or be in a position to force her deserting husband to maintain for her, a style of living to which she has agreed to submit or which she has bargained to attain. It is therefore submitted that the wife's

means must be considered "adequate" if they are such as to enable her to keep up the style of living which she has been used to before the husband's desertion. There may, however, be one qualification of this view—that the wife's means may be "adequate" though she cannot afford to purchase articles of "mere luxury" which she has been used to having before the desertion. The law relating to infants' contracts appears to recognise a distinction between "articles of mere luxury" and "luxurious articles of utility" (*Chapple* v. *Cooper* (1844) 13 M. & W. 252, 258), but as it is impossible to find any absolute standard of what are "mere" luxuries the distinction is in fact difficult to apply. If the distinction exists in the law of husband and wife, then a wife who lives with her husband may have implied authority to pledge his credit for such articles, but a deserted wife would have no similar authority of necessity.

Denning L.J. bases his judgment in the present case in part on the distinction that if a wife pledges her husband's credit for necessaries the third party can enforce the husband's liability at common law, whereas if she borrows money on his credit for the purchase of necessaries the husband can only be made liable to repay the loan in equity. Equity, however, only intervenes where the wife has exhausted her other remedies, *i.e.*, in this case only if she had attempted to obtain provision from the husband by applying to the justices or to the High Court. "It cannot be supposed that the wife can get more out of her husband by borrowing from her relatives than by going to the courts" (at p. 783). Hodson L.J. takes a contrary view: "The fact that the wife did not exhaust her remedies would not, I think, in a proper case prevent an agency of necessity from arising" (at page 787). In view of *Sandilands* v. *Carus* (*supra*) there can be no doubt that the view of Hodson L.J. is correct, at any rate so far as the common law right is concerned. Nor does it seem that the distinction between necessaries and loans for necessaries ought to be perpetuated. There is no distinction in principle between the two cases: in each case the wife pledges the husband's credit in order to provide herself with the means of livelihood. Here, if ever, is a case for arguing that the fusion of common law and equity has combined two formerly distinct principles into one comprehensive remedy.

It is interesting to note further that, just as in this case the court refused to enlarge a deserted wife's rights at common law, so in *National Assistance Board* v. *Wilkinson* [1952] 2 Q.B. 648 the Divisional Court rejected the argument that the National Assistance Act, 1948, had given a deserting wife a new right to be maintained by her husband which she did not previously have at common law. The court held that the husband was not after the Act, any more than before it, bound to maintain a deserting wife, so that assistance paid to the wife could not be recovered by the National

Assistance Board from the husband; nor could the husband be ordered to make weekly payments to the wife.

G. H. Treitel.

Adoption—Refusal of Parents' Consent

The recent decisions of the Divisional Court in *Hitchcock* v. *W. B.* [1952] 2 Q.B. 561 and the Court of Appeal in *Re Kuzmicz* (*An infant*) [1952] 2 T.L.R. 745 give a clear indication of the courts' attitude in relation to the requisite consent of the natural parents in adoption cases.

In both cases the superior courts, overruling the decisions of the local tribunals, held that consent had not been unreasonably withheld under section 3 (1) (*c*) of the Adoption Act, 1950. Section 3 lays down that the consent of the natural parent to an adoption order can be dispensed with in certain specified cases and concludes with a general provision (section 3 (1) (*c*)) enabling this consent to be dispensed with if the court is satisfied (inter alia) that it is being unreasonably withheld.

In interpreting the effect of this section, the courts appear to have disregarded the welfare principle and relied on the behaviour of the natural parent in determining whether the refusal (or as happened in *Kuzmicz*, the withdrawal) of consent is unreasonable. The test laid down that the courts should apply was succinctly put by Jenkins L.J. in the *Kuzmicz Case* (at 570): "Is consent being whimsically or arbitrarily withheld or is it made in good faith?" Furthermore, the learned Lord Justice pointed out that prima facie it would seem to be eminently reasonable for any parent to withhold consent to an order thus completely and irrevocably destroying the parental relationship. He went on to stress the standpoint of the parent by suggesting that any other approach would mean that parents in humble circumstances would be jeopardised in rearing their own children in favour of prospective adopters in more affluent circumstances. If more conclusive evidence of the courts leaning towards the parental side is required, one need look no further than the statement of the Lord Chief Justice in the *Hitchcock Case* (at 510): "But the mere fact that the adoption order will be for the benefit of the child does not answer the question whether consent is being unreasonably withheld."

It is submitted that for a variety of reasons the decisions are unfortunate and hardly consonant with the state of the law in other matters relating to children. In questions of custody and guardianship the legislation has specifically provided in section 1 of the Guardianship of Infants Act, 1925, that the child's welfare is the paramount consideration. Equally it is submitted, in deciding whether or not to make an adoption order, the court should consider

the child's welfare as of paramount importance. The only substantial difference between guardianship and adoption is the extinction of the natural parents' rights. No doubt such a deprivation is a grave step to take, but the rights of the parents can be adequately protected without subordinating the child's interests to theirs.

It seems regrettable that the parents should be allowed, by refusing their consent, to deprive the court of the chance to make an order required for the infant's welfare. No doubt there will be instances in which the child's interest will be best served by a refusal of consent and it is in this light, it is submitted, that the provisions of this section should be viewed. At no time are the parents' wishes completely excluded for it has been decided by the two cases, following *Re Hollyman* [1945] 1 All E.R. 290, that a consent once given can be withdrawn at any time prior to the order being made. This rule should not affect the contention that the parent should not be allowed to withhold or withdraw consent merely on grounds of self-interest.

It may be stated therefore, that the word " unreasonable " has been interpreted from the parents' point of view and not the child's. It is submitted that the true emphasis should be on the child's welfare and that the courts should have insisted on a higher standard of parental behaviour and held that the parents act unreasonably unless the interests of the child are put before any consideration of the parents' wishes. This test should of course be an objective one based on a standard set up by the court as to the duty of parents faced with an adoption order.

In this connection it is interesting to observe that according to Press reports, the parent in the *Kuzmicz Case* has again returned the child to the foster parents. Despite this, it seems that she is still not prepared to agree to a permanent adoption. It is, surely, just the risk of this sort of uncertainty and constantly shifting home background that the legislature hoped to avoid by providing that the parent's consent could be dispensed with where it was being unreasonably withheld? It is to be hoped that this question will receive consideration by the recently appointed Departmental Committee reviewing the working of this branch of the law.

L. J. Blom-Cooper.

Recognition of Sovereignty

The year 1952 has produced two decisions of the highest tribunals of the British Commonwealth of Nations on the important and difficult question of the effect upon matters of State succession of a foreign government's recognition by the Sovereign of this country: *Gdynia Ameryka Linie* v. *Boguslawski* [1953] A.C. 11, and *Civil*

Air Transport Inc. v. *Central Air Transport Corporation* [1953] A.C. 70. The problems in both cases were so similar that it is not easy to discover why the former case, decided by the House of Lords, was not even referred to in the opinion which Lord Simon delivered in the latter case on behalf of the Judicial Committee.

This country had recognised the Polish Provisional Government established in London and the Chinese Nationalist Government eventually established in Formosa as the *de jure* Governments of Poland and China respectively. As from July 6, 1945, *de jure* recognition was granted to the Government of National Unity established in Poland which had been the *de facto* government of metropolitan Poland from June 28, 1945. As from January 6, 1950 *de jure* recognition was granted to the Communist Government of China which since October 1, 1949, had been the *de facto* government of such parts of China as it effectively controlled. In both cases the courts were concerned with the effects of acts done in London and Hongkong respectively by the old governments while recognised *de jure*. Could it be said that in view of its retrospective effect the grant of *de jure* recognition to the new governments invalidated the acts done by the old governments?

In the case of Poland the old Government's Minister of Industry, Commerce and Shipping, being under Polish law the supreme controller of the appellant company, a corporation formed in Poland on July 3, 1945, made a contract with the respondent, an officer in the Polish merchant navy, whereby the latter became entitled to certain monetary compensation. It was argued by the appellants that by virtue of the retroactive effect of recognition the transaction entered into by the old government was invalid. It was held, however, that "retroactivity of recognition should be confined to spheres of *de facto* control" (at p. 39, *per* Lord Oaksey) and that "that control did not extend to the old government or to the Polish merchant fleet and its personnel until July 6, 1945" (at p. 29, *per* Lord Porter). The House thus rejected a suggestion, founded upon *Guaranty Trust Co.* v. *United States* (1938) 304 U.S. 126, that, except in so far as completed transactions with nationals of the recognising country were concerned, the retroactive effect of recognition was free from qualification. It is impossible within the ambit of these observations to discuss all the ramifications of the opinions delivered in the House of Lords or to do more than to mention Lord Morton's view to the effect that the Foreign Office has the power to exclude the principle of retroactivity and had in fact done so in the present case. But two points may usefully be stressed. The appellants contended that on account of their domicile in Poland they were at the material date under the effective control of the new rather than the old government. But, in the words of Lord Reid, the respondent relied "on powers conferred on the Polish Government by Polish legislation and the government entitled to operate such powers in London on July 3, was the government which was

then recognised as the Government of Poland by the British Government" (p. 46). In other words, the House did not question the proposition that a company is under the effective control of that government which controls the country of the company's incorporation or domicile; but the dispute arose out of acts done, not by the company in exercise of its corporate powers, but by the Polish Government in London in exercise of Polish legislation applicable to the company. It was clear, therefore, that the appellants' Polish domicile could not deprive the London Government of the particular control exercised by it. Moreover, it is important to remember that neither before nor after its *de jure* recognition did the new Government of Poland do anything to repudiate or nullify by legislation the old government's acts. The decision of the House of Lords does not permit any forecast as to what the result would have been had the two governments taken conflicting measures.

A conflict arose in the Chinese case. It concerned 40 aircraft lying in Hongkong, but belonging to the respondents who, notwithstanding their description, were an unincorporated body, an organ of the Government of China. On November 12, 1949, the Communist Government of China issued an announcement assuming control over the respondents and appointing a general manager. On November 13, 1949, the Nationalist Government appointed another manager who dismissed the Chinese staff in Hongkong and appointed a European Chief of Security with full power to take care of the aircraft. A few days later, without his consent, some of the Chinese ex-employees took physical possession of the aircraft. On November 24, the Nationalist Government's manager obtained an interim injunction against the ex-employees prohibiting them from interfering with the aircraft and restraining them from entering or remaining on the respondents' premises. The injunction was disregarded and the ex-employees remained in control. On November 25 the ex-employees obtained an interim injunction restraining the respondents from removing the aircraft. On December 12 the Nationalist Government sold the aircraft to a partnership, formed by two United States citizens, for $1,500,000 "in promissory notes." On December 19 the buyers transferred the aircraft to the appellant company, a Delaware corporation. On May 10, 1950, the Supreme Court of Hongkong (Jurisdiction) Order, 1950, was made; it made special provision for any proceedings involving the 40 aircraft and, in particular, lifted the bar to jurisdiction arising from the fact that proceedings would implead a foreign sovereign State. On May 19, 1950, the Delaware corporation instituted proceedings for a declaration that the aircraft were its property; in effect the action was directed against the Communist Government of China, then recognised *de jure*. The action failed in the Hongkong courts, but succeeded in the Privy Council. No doubt influenced by reasons of prestige rather than wisdom the Communist Government did not appear in the proceedings nor did the Privy Council invite one of

the law officers to appear as *amicus curiae* so that the respondents' case was not argued.

The principle formulated by the House of Lords in the Polish case prima facie did not support the Delaware corporation's case. In December, 1949, the aircraft were in fact under the control and in the possession of the ex-employees and, through them, in the control and possession of the Communist Government. Since the Polish case decided by implication that *de jure* recognition of the new government validated acts done before recognition in so far as those acts related to matters under the new government's control at the time when the acts were done, the American plaintiffs' action was likely to be dismissed, unless the Polish case was distinguishable. A distinction could be drawn from the fact that before the withdrawal of recognition in January, 1950, the Nationalist Government took action with regard to the aircraft then already under the control of the Communist Government; but the question how the resulting conflict was to be solved was again left open. It might also be suggested that the Polish case failed to state the true principle and that this was that retroactivity must be limited to acts done within the territory of the *de facto* government; but in view of the practice relating to ships Lord Simon rejected such a proposition as too wide. He preferred to rely on what was undoubtedly a better and, indeed, decisive point. He held that, in order to be validated by the *de jure* recognition, possession and control by the new government must have been lawfully obtained. Since the ex-employees, when taking possession of the aircraft on behalf of the Communist Government, had acted illegally and, in particular, in defiance of the Hongkong court's injunction, their control over the aircraft could not give ground for the principle of retroactivity and the Nationalist Government retained its superior title to possession so that the sale in December, 1949, was effective. It remains a matter of speculation what the position would have been, if the injunction obtained by the ex-employees on November 25 had not been limited to the removal of the aircraft, but had included the prohibition to dispose of them.

In the result the principle of law established by these two decisions may be stated as follows: while the recognition of a *de jure* government dates back to the time when that government is recognised as having assumed *de facto* control, such retroactivity applies only within the territory which at the material time was effectively controlled by that government, or outside such territory in respect of matters which at the material time that government controlled effectively and in accordance with the local law.

In the present context it is impossible to pursue the question whether further qualifications are likely to be introduced into the principle of retroactivity. By such decisions as *The Arantzazu Mendi* [1939] A.C. 256 the courts have created for themselves barriers which are both unfortunate and unnecessary and which will

slowly have to be taken down again. Every principle of law and justice would have demanded the simple rule, underlying *Haile Selassie* v. *Cable and Wireless, Ltd.* (*No.* 2) [1939] Ch. 182 and readily justifying the results in the Polish as well as in the Chinese case, that (i) in matters of succession the *de jure* government is the internationally authorised organ of the State, and (ii) its acts are not made ineffective merely by the subsequent recognition of another *de jure* government (which is nothing but a successor organ of the same State) or by the existence or subsequent recognition of a *de facto* government (which, when in conflict with the *de jure* government, is of inferior title) or by any principle of retroactivity. See on the foregoing Lauterpacht, *Recognition in International Law*, p. 345.

It remains, however, to turn to another aspect of the Privy Council's advice in the Chinese case. In the Hongkong court the validity of the sale by the Nationalist Government was impugned on the additional ground that it was "an act of members of the Nationalist Government done, not in good faith as trustees, but for an alien and improper purpose," to wit the purpose of embarrassing the Communist Government then about to be recognised *de jure*. Lord Simon rejected this reasoning on two grounds, the one factual, the other legal. He pointed out that the validity of the sale had to be judged as at the date when it was effected and that at that time it was not any more impeachable "than would have been the blowing of a store of ammunition." He continued to state an important principle of law (p. 92):—

> "A government's policy in buying or selling chattels which it owns is not subject to the review by foreign tribunals and whether its action in this regard is against the interests of those whom it is supposed to serve is a political question. British courts cannot take it upon themselves to pronounce whether a foreign government, recognised by Her Majesty's Government, is acting contrary to the interests of its people, and a government is certainly not a trustee in these matters in any legal sense."

One cannot but respectfully applaud this statement which, as Lord Simon himself explained, may be subject to certain exceptions. The only comment that should be added here is that the issue before the Board was not the validity of the transaction in international, Chinese or American law, but its propriety or, to use the phrase employed in the Hongkong courts, its compatibility with "normal diplomatic usage." Mere impropriety of policy, mere disregard of interests was incapable of impeaching the sale so long as its legal validity stood unchallenged. Only if it had been challenged would the question have arisen whether and to what extent an English court could inquire into the legality *stricto sensu* of acts done by a foreign government.

F. A. Mann.

Mens Rea and Negligence

In his book *General Principles of Criminal Law*, Professor Jerome Hall argues persuasively against the construction of statutes as imposing absolute criminal responsibility, and contends that they should be interpreted either as requiring *mens rea* or at the most as imposing responsibility for negligence. Most of the social purposes sought to be secured by absolute prohibition can be obtained by penalising negligence, and the punishment of negligence does not offend the sense of justice in the same way as absolute responsibility does.

Hitherto English courts have made little use of the concept of criminal negligence. A statute absolute in its terms is construed either as impliedly requiring *mens rea* (that is, intention or subjective recklessness), or else as not requiring any fault and therefore as ruling out even the defence of inevitable accident. Courts have not taken the middle course of construing the statute as aimed against negligence. For this reason the decision in *Leicester* v. *Pearson* [1952] 2 All E.R. 71, is both interesting and important. The decision turned on the Pedestrian Crossings (London) Regulations, 1951, reg. 4, which accorded precedence to a foot-passenger on a pedestrian crossing, and which made no reference to the mental element or fault required to constitute an offence on the part of the motorist. It was held by a Divisional Court that the regulation impliedly required proof of negligence.

It has been suggested by the Editor of *The Law Quarterly Review* that the decision " will, in large part, tend to destroy the efficacy of zebra crossings " (68 L.Q.R. 468), but this is perhaps an alarmist view. In ordinary circumstances a motorist who knocks down a pedestrian on a crossing will rightly be held guilty of negligence. In the instant case there were special factors (including the fact that the accident took place on a wet night, and the crossing was poorly lit), which led the justices to hold that there was no negligence in the motorist, and from this finding of fact there was no appeal. The finding may have been right or it may have been wrong; if it was right, there would seem to be no purpose in punishing a motorist for an accident that he could not help; even if it was wrong, the acquittal of this particular motorist would at least serve a useful purpose if it called the attention of the authorities to the necessity for lighting zebra crossings properly, in order to exclude the defence that the visibility was poor.

Dr. Goodhart's strictures on the case were repeated in a leading article in *The Times*, which provoked some interesting letters championing the other view. Replying to these letters, Dr. Goodhart characterised as " novel doctrine " the view that an attempt to impose strict liability upon motorists could only properly be consummated (supposing such a policy to be justified) by an Act of Parliament. One may, however, point to the case of *L. P. T. B.* v.

Sumner (1935) 154 L.T. 108, where it was held that subordinate legislation (there, a by-law) cannot create strict criminal responsibility unless expressly enabled to do so by Parliament. This case has never been overruled or questioned, though it has not received the prominence it deserves.

It has been assumed that an acquittal of the motorist on a criminal charge must necessarily affect the construction of the regulations in a civil action for damages. This, however, is not necessarily so. The policy of crime and tort being different, and the mode of construction of statutes being different, it seems that where legislation prohibits an act, a criminal intention or (sometimes) negligence may be required on a criminal charge, yet not in a tort action for breach of statutory duty. That such a distinction is possible in interpretation is indicated by the judgments of Brett J. in *Dickenson* v. *Fletcher* (1873) L.R. 9 C.P. at p. 7, and of Tucker and Jenkins L.JJ. in *Harrison* v. *National Coal Board* [1950] 1 K.B. at pp. 476–7.

It is a fair presumption that a statute or regulation governing the mode of driving a motor-vehicle is intended to create criminal responsibility for negligence, because it has long been accepted that this is a sphere in which an offence can be committed by negligence. Ordinary crimes, however, require *mens rea*, and cannot be committed merely by negligence—much less can they be committed without any fault. The heterogeneous offences construed as being of absolute prohibition are a large and puzzling exception to this proposition. Various judicial dicta have given rise from time to time to the hope that the courts will cease to add to these offences, but the hope is regularly dashed. In *Taylor* v. *Kenyon* [1952] 2 All E.R. 726 the Divisional Court held that the statutory prohibition of driving while disqualified is an absolute one, so that a person can be convicted although he did not know and had no reason to suppose that he was disqualified. On the facts of the case this sweeping decision was unnecessary, because the particular defendant had clearly brought himself within the doctrine of "wilful blindness," as McNair J. held. Although the actual decision did no injustice to the defendant, it is the sort of ruling that is capable of the most vexatious application.

GLANVILLE WILLIAMS.

JOINT BAILMENTS AND JOINT ACCOUNTS

THE following story is told of Noy, Attorney-General to Charles I, during his early days at the Bar.

"The first evidence of his splendid abilities, quickness of perception, and extensive research, was given in a cause, in which three graziers at a fair, had left their money with their hostess, while they went to the market: one of them returned, received the

money, and absconded; the other two, sued the woman for delivering what she received from the three, before they all came to demand it together. The cause was clearly against the woman, and the judgment was ready to be pronounced, when Mr. Noy, not being employed in the cause, desired the woman to give him a fee, as he could not plead in her behalf unless he was employed, and having received it, he moved in arrest of judgment, that he was retained by the defendant, and that the case was this; the defendant had received the money from the three together, and was not to deliver it until the same three demanded it; that the money was ready to be paid, whenever the three men should demand it together; this motion altered the whole proceedings." [1]

The amusing feature of this case was, of course, that the plaintiffs fell into the pit that they had dug for the defendant. The very argument that was necessary to sustain the plaintiff's case was held to destroy it.

What would have happened if the absconding grazier had later returned and joined the other two in suing for the return of the money? It seems that even then the action would fail; the absconding grazier could not sue because he had himself procured the wrong; and since the absconding grazier could not sue individually, he could not sue jointly with the others. This was the decision in *Brandon* v. *Scott* (1857) 7 El. & Bl. 234.

Justice requires some way to be found out of this dilemma, and it is submitted that the way is to be found by denying the validity of Noy's argument. The argument for the two innocent graziers was not in fact a boomerang argument, as Noy maintained. Noy's defence involved a confusion between primary and sanctioning rights. The landlady's primary duty was to the three jointly; but when she violated that primary duty by delivering the money to one of the three, there was no reason why the sanctioning duty to pay damages should have been owed to the three jointly. Rather the reverse, for, as *Brandon* v. *Scott* shows, no damages were owed to the absconder himself. It is submitted that the violation of the

[1] Bythewood's "Sketch of the Author's Life" in Noy's *Principal Grounds and Maxims*, 9th ed. (1821), viii–ix. Bythewood adds: "It may be presumed from this case, that our author was not unacquainted with the civil law, a fruitful source of juridical knowledge, from which the English lawyer may derive both instruction and pleasure [quoting Sir William Jones, *Law of Bailments*, 12, 51]. Ulpian states the same point, in the *Digest* [D.16.3.14., D.16.3.1.36,44. *Vide* Just.Inst.3.15.2,3. *Ibid.* 4.1.6. 1 Domat, 141, 142, edit. 1722, Bk. 1, tit. 7, ss. 11 and 13. Wood's *Civil Law*, 209, 212, 2nd ed.], but there is, indeed, a similar determination in Brooke's *Abridgment* [Bailment, pl. 4], probably derived from the same abundant fountain." The civil law references do not appear to raise the problem so neatly as in the incident above, and the reference to Brooke is wrong: I cannot trace anything bearing on it in either Brooke or Fitzherbert.

Bythewood does not state the source of his *Life of Noy*, and the tale is probably apocryphal. An almost identical story is related of St. Ivo, the Breton advocate and patron saint of lawyers, and it also appears in a play called *The Honest Lawyer*, written by D. S. and printed in 1616. See E. B. V. Christian, *Solicitors: An Outline of their History* (1925), 89.

duty owed jointly resulted in a joint and several right to damages in those who had not been paid.

The position is a bit more difficult where instead of a bailment there is a debt. A and B have a joint bank account; A forges B's signature to a cheque and thus obtains payment out of the account. By paying A, the bank commits no tort to B; it is not a case of wrongful dealing with B's property. Had A been a stranger, B would have had the same right against the bank as if the forged cheque had not been met; his cause of action would date not from the payment of the forged cheque but from the bank's refusal to pay him on demand the sum standing to the credit of his account. Does it make any difference that the forgery is by one of the joint creditors? In *Brewer* v. *Westminster Bank* [1952] 2 All E.R. 650, McNair J. held that it did; purporting to follow *Brandon* v. *Scott*, he held that B had no remedy against the bank. He could not sue for payment of the sum standing to the credit of the joint account without joining A, and A could not be joined because he had been paid.

It is submitted with respect that the error in this reasoning is in asserting that A had been paid. It is true that A had in fact been paid a sum of money; but this payment to A individually was not a performance of the bank's duty to pay both jointly. The payment was something quite outside of and irrelevant to the contractual obligation. The proper solution was to allow A and B to join in an action against the bank, and to allow the bank to counterclaim against A for repayment. In the instant case the action was by B alone, but A was joined as co-defendant with the bank; and the learned judge recognised that so far as form went this was just as good as an action by the two jointly.

An appeal was settled in court in the terms that the bank paid the plaintiff and indemnified her against costs (*The Times*, February 5, 1953). But, as Denning L.J. pointed out, "meanwhile there is a reported authority . . . , a decision on the legal point, in [the bank's] favour."

Glanville Williams.

Recklessness in Criminal Law

The case reported in [1952] 2 All E.R. 842 as *R.* v. *Bates* and (on appeal) in [1953] 1 W.L.R. 77 as *R.* v. *Russell* is a sad example of the failure of judges to develop a consistent meaning for basic legal terms.

Hitherto it has been supposed that the word "recklessness" has two meanings in law, an objective meaning of gross negligence and a subjective meaning of advertent negligence. In the latter meaning, it involves knowledge of the circumstances and foresight of the consequences of conduct—in other words a determination to pursue conduct with knowledge of the risks

involved though without a desire that they should eventuate. The former, objective, meaning seemed undesirable, because it merely duplicated the technical expression "gross negligence," and opinion seemed to be consolidating that the term was best used in its subjective sense. This was in accordance with the view of Salmond, that "negligence is of two kinds, according as it is or is not accompanied by inadvertence. Advertent negligence is commonly termed wilful negligence or recklessness" (*Jurisprudence*, 7th ed., 411).

Now all is upset. In the case referred to, Donovan J. said: "The ordinary meaning of the word 'reckless' in the English language is 'careless,' 'heedless,' 'inattentive to duty.' I ought to give that meaning to the word unless it is clear that in section 12 (1) [of the Prevention of Fraud (Investments) Act, 1939] it bears a restricted meaning." He therefore went on to direct the jury that a person could be convicted of recklessly making a false statement although he honestly believed it to be true. On appeal the Court of Criminal Appeal approved this view, while recognising that the point was not really before the court, because the jury had not in fact convicted on the count in question.

If the judges are right, recklessness becomes merely an otiose synonym for negligence in general. It is submitted that, whatever the etymology, that has not been its meaning for many years. The word was implicitly defined in the context of deceit by Lord Herschell in his celebrated judgment in *Derry* v. *Peek* (1889) 14 App.Cas. 437 at pp. 364, 367, 374. Recognising that deceit can be committed recklessly, he laid it down that deceit cannot be committed by inadvertent negligence, even though gross. Lord Herschell said: "To make a statement careless whether it be true or false, and therefore without real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true." The former could be called reckless because the person making the statement would know that it might be false; the latter, involving no such knowledge, was not reckless in law. Donovan J., acknowledging that that was the position in the tort of deceit, was yet prepared to rule that the position in this statutory crime of fraud is more stringent. His view is open to the following objections. (1) It upsets the settled meaning of recklessness. (2) It gives the word a meaning for which there is already an accepted term, and deprives it of a meaning for which there is no other single word. (3) It creates a difference of terminology between civil and criminal law. (4) It makes the meaning in crime more severe than in tort.[1] (5) It creates by judicial construction a new offence not

[1] It is of course appreciated that in this field an even lower degree of culpability may give rise to both tortious and criminal liability under Companies Act, 1948, s. 43 (re-enacting the Directors' Liability Act, 1890) and s. 44, but there the legislature's intention is made clear beyond doubt.

requiring *mens rea* when, despite the argument of Donovan J. that "recklessness" was contrasted with "knowledge" and "dishonesty," there was no adequate indication in the statute that *mens rea* was intended to be dispensed with. Inadvertent negligence is not a form of *mens rea*, because it is not, by definition, a state of mind.

GLANVILLE WILLIAMS.

MASTER AND SERVANT—CRIMINAL LIABILITY

Gardner v. *Akeroyd* [1952] 2 All E.R. 306 is an important case concerning the criminal liability of a master for the acts of his servant and the presumed requirement of *mens rea* in statutory offences. The respondent, a butcher, left an assistant in charge of his shop in his absence, during which period parcels of meat were prepared and tickets attached, giving the names of purchasers and showing prices in excess of the maximum prescribed by the Meat (Prices) (Great Britain) (No. 2) Order, 1951, made under regulation 55AB of the Defence (General) Regulations, 1939. The butcher and his assistant were charged with doing acts preparatory to the commission of an offence contrary to regulation 90 (1) of the Defence Regulations. The assistant was convicted and the informations against the respondent were dismissed by the justices, their opinion being sustained by the Divisional Court (Lord Goddard C.J., Slade and Parker JJ.).

It is clear that if the parcels had actually been sold, then an offence would have been committed by both the assistant and his master. The prohibition against selling above the maximum price is absolute, and had the sale been effected, the master would have been guilty of the full offence, it being no defence to show that the acts had been done in his absence and without his knowledge.

It is also probable, as appears from the judgment of the Lord Chief Justice, that the assistant could have been charged not merely under regulation 90 (1) with doing an act preparatory to the commission of an offence against regulation 55AB, but with actually attempting to commit the offence. Adopting the test in *R.* v. *Eagleton*[1] and *R.* v. *Robinson*,[2] the acts committed were immediately connected with the offence of selling in excess of the maximum price and were not mere acts of preparation. Adopting the tests of Mr. J. W. C. Turner, the acts were "unequivocally referable"[3] to the full offence, "indicating beyond reasonable doubt the end towards which they were directed."[4] Nevertheless the charge was that of doing acts preparatory to the commission of

[1] (1855) Dears.C.C. 376, 515.
[2] [1915] 2 K.B. 342.
[3] "Attempts to Commit Crimes," in *The Modern Approach to Criminal Law* at p. 280.
[4] *Russell on Crime*, 10th ed., vol. 2, at p. 1790.

an offence against the Defence Regulations, a crime which "the law would regard as something less than an attempt," [5] in that the *actus reus*, taking place at an earlier stage, is further removed from the commission of the complete offence.

Both the Lord Chief Justice and Parker J. stress emphatically the requirement of *mens rea* in the interpretation of regulation 90 (1). Lord Goddard follows the line he has already taken in such cases as *Brend* v. *Wood*,[6] *Harding* v. *Price* [7] and *Younghusband* v. *Luftig* [8] that "unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime," a man should not be found guilty of a criminal offence unless he has a guilty mind. Moreover, *mens rea* being necessary in the case of an attempt, in that one cannot attempt what one does not intend, it would be illogical and dangerous to dispense with the need for proving a guilty mind in an offence which has not yet reached the attempt stage and is, therefore, all the more deserving of the safeguard of the *mens rea* requirement. Furthermore, as Parker J. points out, the words in regulation 90 (1), which prohibit acts preparatory to the commission of an offence under the Defence Regulations, cannot amount to an absolute prohibition only in relation to those completed offences under the Defence Regulations which are themselves absolutely prohibited and not in relation to the rest, which require proof of *mens rea*. Alternatively, to read the words in regulation 90 (1) as always amounting to an absolute prohibition would lead to absurd results, once regard was had to the full offence.

The court refused to hold the master liable for an act of preparation, or (*obiter*) for an attempt, committed by another without his knowledge and against his intention on the grounds that he would otherwise be strictly guilty even though he prevented the commission of the substantive offence on becoming aware of the facts. It is equally difficult to disagree with Lord Goddard's disapproval of such an extension of criminal liability as is to be found in regulation 90 (1): the law relating to attempts is sufficiently evolved to dispense justice in that field without the need for a vague residuary offence, whose existence could only be justified in time of war, if ever.[9]

It is interesting to note at p. 217 of the July, 1952, number of the *Journal of Criminal Law* the report of a case, almost identical to *Gardner* v. *Akeroyd*, which, decided slightly earlier in the

[5] *Per* Lord Goddard C.J. at p. 311.
[6] (1946) 175 L.T. 306.
[7] [1948] 1 K.B. 695.
[8] [1949] 2 K.B. 354.
[9] This practice of inserting in a statute such words as "or does any act preparatory to the commission of an offence under this Act shall be guilty of an offence," as in s. 7 of the Official Secrets Act, 1920, has been frequently adopted recently; *e.g.*, s. 8, the Salmon and Freshwater Fisheries (Protection) (Scotland) Act, 1951; s. 15 (1), the Dangerous Drugs Act, 1951.

Marylebone Magistrates' Court, reached quite a different conclusion. Once again it was found that a butcher's employee had attached to a parcel (which was intercepted before delivery by a food enforcement inspector), a price in excess of that permitted by the Meat (Prices) Order, 1951. He was charged together with his two employers with doing an act preparatory to the commission of an offence contrary to regulation 90 (1) of the Defence General Regulations, all three pleading mistake. The prosecution accepted the fact that this lapse was due to a mistake, but alleged, successfully, that since the actual sale was absolutely prohibited, the accused's state of mind was irrelevant provided they performed an act preparatory to the sale. The accused's plea that preparing required a definite object and purpose was rejected, the element of intent being held as immaterial in the preparatory act as it was in the completed offence.

Although this decision must now be considered subject to that of the Divisional Court in *Gardner* v. *Akeroyd*, both cases raise indirectly the problem of the degree of intent required for attempting an act of absolute prohibition. If the attempt were merely a common law offence, one would imagine, *a fortiori*, that a bona fide mistake of fact would be a good defence even though the completed act itself were absolutely prohibited. Thus if in 1884 the barman in *Cundy* v. *Le Cocq* [10] was stopped before he actually sold the liquor to the drunkard, on being subsequently charged with attempting the sale, he could successfully plead that he honestly believed the man to be sober. On the other hand, in *R.* v. *Sorsky*,[11] an analogous case on a common law conspiracy to commit an offence of absolute prohibition, the Court of Criminal Appeal held that the accused's state of mind was immaterial provided the full offence was absolutely prohibited, a principle which evidently found approval, perhaps unwittingly, in the earlier of the two butchers' cases but was rejected in *Gardner* v. *Akeroyd*.

Apart from liability possibly incurred for aiding or counselling an offence, the responsibility of a master for the wrongful acts of his servant is dependent in criminal law upon the nature of the positive or negative duty imposed by the statute concerned. The important factor is not the master-servant relationship but rather the breach of a personal duty by a principal who is liable for failing to ensure accurate performance of a statutory obligation. As Devlin J. has said in *Reynolds* v. *G. H. Austin*,[12] "although in one sense the citizen is being punished for the sins of others, it can be said that if he had been more alert to see that the law was observed, the sin might not have been committed." His guilt is, in a sense, not vicarious but personal.

[10] (1884) 13 Q.B.D. 207.
[11] [1944] 2 All E.R. 333, following *R.* v. *Clayton* (1943), reported in 65 T.L.R. at p. 329.
[12] [1951] 2 K.B. at p. 149.

"This does not mean that whenever an Act forbids something, the master is liable if his servant does the act forbidden," [13] for most statutes clearly do not impose such heavy personal obligations, and it must depend ultimately on the interpretation by the courts as to what was the intention of the legislature in drafting the section.

With regard to those sections which the courts have held to be of absolute prohibition, it has long been clear, certainly since the judgment of Atkin J. in *Mousell Brothers* v. *London & North-Western Ry.*,[14] that a master will be liable if the prohibited act is committed by a servant even against the express commands of his master, and it is of no importance that the delegation has been to a servant rather than to an agent, partner or independent contractor. Thus regulation 26 (1) of the Milk and Dairies Regulations, 1949, imposes an absolute (and hence personal) duty upon a distributor to ensure that every vessel should be in a state of thorough cleanliness, and the wrongful act of the person to whom the distributor has delegated the performance of his duty will render the distributor liable.[15]

A similar liability may be found in the field of tort in the judgment of Denning L.J. in the recent case of *Cassidy* v. *Minister of Health* [16]: "I take it to be good law as well as good sense that where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else. . . ." In *Cassidy* v. *Minister of Health* the learned Lord Justice, when dealing with the question of whether the delegatee was a servant or an independent contractor, held the distinction to be immaterial in such cases; by analogy in criminal law, once the court has established that the duty of ensuring performance is absolute and personal, the actual relationship of the two parties is of no importance provided they be delegator and delegatee, and the offence committed falls within the scope of the duty delegated.[17] Thus the two parties may be master and servant,[18] joint licensees,[19] or principal and agent.[20] The accused in such cases, whether they fall under sections of the Food and Drugs Act, 1938, the Bankruptcy Act, 1914, the Merchandise Marks Act, 1887, the various Licensing Acts or other stringent enactments, is guilty because being responsible in law, "he has chosen to delegate his duties, powers and authority to another," [21] who has misperformed. He is guilty, not because his servant has infringed

[13] *Per* Lord Goddard C.J. in *Gardner* v. *Akeroyd* [1952] 2 All E.R. at p. 310.
[14] [1917] 2 K.B. 836.
[15] *Quality Dairies (York), Ltd.* v. *Pedley* [1952] 1 All E.R. 380.
[16] [1951] 2 K.B. at p. 363.
[17] *Cf. Barker* v. *Levinson* [1950] 2 All E.R. 825.
[18] *Cundy* v. *Le Cocq* (1884) 13 Q.B.D. 207.
[19] *Linnett* v. *Commissioner of Metropolitan Police* [1946] K.B. 290.
[20] *R.* v. *Leinster (Duke)* [1924] 1 K.B. 311.
[21] *Per* Lord Goddard C.J. in *Linnett* v. *Commissioner of Metropolitan Police* [1946] K.B. at p. 295.

a section of absolute prohibition but because, by delegating to the wrong person, he has failed in his personal duty to ensure performance of a statutory obligation.

Moreover, it is not merely sections of absolute prohibition, dispensing with the requirement of *mens rea*, which are interpreted as imposing this additional responsibility and if a guilty mind or a specific intent is required, that of the servant, partner or agent will be sufficient, as in *Mousell Bros.* v. *London & North Western Ry.*[22] Thus the offence in *Allen* v. *Whitehead*[23] was that of "knowingly" suffering prostitutes to gather on licensed premises, contrary to section 44 of the Metropolitan Police Act, 1839,[24] and in *Mullins* v. *Collins*[25] a conviction was sustained for serving liquor to a constable on duty, an offence involving *mens rea*, even though the master himself knew nothing of the incident. In these two offences, the responsibility for running a public-house is interpreted in the public interest as being personal to the publican and requiring his supervision, and if he should choose to delegate the performance of his duty, he must abide the consequences even though the person whom he has entrusted should act against his express orders. On the other hand, with regard to offences of attempt, statutory or common law, the Divisional Court would seem to be of opinion that this interest is not served by placing a personal and absolute[26] duty upon the master of ensuring strict compliance with statutory requirements.

The difficulty in these cases is that of determining upon whom the burden of responsibility has been placed by the statute. Just as in the tort field of negligence the degree of duty imposed may vary, so in criminal law, apart from questions of aiding and abetting, involving personal knowledge on the part of the master,[27] liability will depend on the nature of the prohibition or obligation involved. The fact that a section is one of absolute prohibition is only of importance inasmuch as it provides an instance of a duty, the responsibility for which is personal. The master will be guilty because "he cannot escape the consequences of a breach of his own duty."[28]

S. Prevezer.

[22] The relevant section, s. 99 of the Railway Clauses Consolidation Act, 1845, requiring an "intent to avoid the payment of any tolls payable in respect of the goods. . . ."

[23] [1930] 1 K.B. 211.

[24] And not contrary to s. 76, the Licensing (Consolidation) Act, 1910, as stated in Kenny's *Outlines of Criminal Law*, 16th ed., at p. 42. s. 76 (1) does contain a similar provision but this was not in question in *Allen* v. *Whitehead*.

[25] (1874) L.R. 9 Q.B. 292.

[26] Absolute, because he would be liable even though he took all reasonable precautions and left strict instructions which in fact were disobeyed or even if subsequently he prevented the commission of the completed offence.

[27] *Ferguson* v. *Weaving* [1951] 1 All E.R. 412; *Johnson* v. *Youden* [1950] 1 All E.R. 300; but see *Carter* v. *Mace* [1949] 2 All E.R. 714 and 66 L.Q.R. at p. 222, "Aiding and Abetting Statutory Offences," by John Montgomerie.

[28] *Per* Denning L.J. in *Cassidy* v. *Minister of Health* [1951] 2 K.B. at p. 364.

The Pride of Derby Case

The Pride of Derby is not, as one might suppose, the famous ram renowned in verse and song, but the name given to an association of anglers whose fishing was ruined, and is still being ruined, by the pollution of the River Derwent. The association, together with a riparian owner who suffered from this same pollution, sued the parties responsible, and the case is now reported as *Pride of Derby and Derbyshire Angling Association and Another* v. *British Celanese, Ltd., and Others* [1953] 2 W.L.R. 58; affirming [1952] 1 All E.R. 1326.

If there is any resemblance in the case to the preposterous characteristics of the mythical ram, it is to be found in the extravagant defences advanced.

The action was brought against the Corporation of Derby (the corporation), the British Electricity Authority (the authority) and British Celanese, Ltd. (the company). There was originally a fourth defendant—a tar distilling company—but this company had abandoned business before the hearing, and the action was stayed against them.

There was little difficulty in establishing a prima facie case. Crude sewage from the corporation's sewer, mixed with industrial effluent from the company's factory and heated up to 100 degrees Fahrenheit by hot water from the authority's power station, produced a brew which extinguished all fish life and fish food in the river.

The company was, as Harman J. found, the principal offender and they offered little fight. Before the hearing they admitted pollution and consented to some form of injunction. Harman J. found that the corporation and the authority substantially contributed to the pollution, but these two defendants advanced the defence that having regard to the fact that it was already established that the company was guilty of actionable pollution their contribution was harmless and not actionable. It was a defence that did not detain Harman J. for long, though for longer than was necessary, we think. After citing *Blair* v. *Sumner & Deakin* (1887) 57 L.T. 522 and *Thorpe* v. *Brumfitt* (1873) 8 Ch.App. 650 for the proposition that "where a number of defendants, none of whom commits an actionable wrong, produces a wrong by the aggregate of their actions, they may all be sued" the judge said that he "could not believe that the law, while holding all of a number of defendants liable if none of them individually commits an actionable wrong, will relieve all the rest if the wrong of one of them is big enough to be by itself actionable." His Lordship was not required to believe anything: he need only have followed *Wood* v. *Waud* (1849) 3 Ex. 748 (followed in *Crossley* v. *Lightowler* (1867) 2 Ch.App. 478) which decided the very point. This particular defence was, in fact, quite worthless and was abandoned in the Court of Appeal. Indeed,

the defendants, each and all of them, were completely destitute of any defence at common law, and the corporation and authority fell back on their privileged position as statutory undertakers.

The corporation's first line of defence in this respect was that the pollution which they caused emanated from a sewerage system constructed under the Derby Corporation Acts, and they sought to evade the decision in *Metropolitan District Asylum* v. *Hill* (1881) 6 App.Cas. 193, by arguing that if an undertaking constructed by a local authority under statutory powers does not constitute a nuisance when completed but subsequently becomes a nuisance by reason of passive conduct rather than by positive act there is no liability since a local authority is not liable for nonfeasance. In the present case, it was submitted, there was no nuisance when the sewerage system was installed but it became so subsequently owing to an increase in the population of Derby, and the only fault in the corporation was in failing to do anything to cope with this increase. The Court of Appeal, affirming Harman J., declined to accept this argument. The proposition that a local authority is not liable for nonfeasance is, as Denning L.J. showed in this case and in his article at 55 L.Q.R. 543, an unjustifiable generalisation from the narrower proposition that a *highway* authority is not liable for nonfeasance. It is true that there are a few sewerage cases (*Glossop* v. *Heston, etc., Board* (1879) 12 Ch.D. 102; *Att.-Gen.* v. *Dorking Union* (1882) 20 Ch.D. 595; *Robinson* v. *Workington Corpn.* [1897] 1 Q.B. 619, etc.) where a local authority appeared to escape the consequences of pollution by pleading a nonfeasance, but these cases when rightly understood were cases where the local authority had not created the source of pollution but had inherited it from others, or else cases where the local authority was purely passive. In the present case the Derby Corporation was not purely passive; the sewage did not merely flow into the river, it was discharged into the river. Moreover, the increased load on the sewerage system was the result of increased building in the city which was permitted by the corporation under its planning powers.

The second line of defence was a variant of the first. The same cases which were cited to prove an immunity in the corporation for a nonfeasance were used to advance the view that the plaintiff's only remedy was an application to the Minister under the Public Health Act, 1875, s. 299, but this defence likewise failed.

Counsel for the defendant corporation then advanced more general, and more extravagant, claims to assert the immunity of the corporation. It was said that it was "not sensible" to sue the corporation in the courts and that "no injunction ought ever to be granted against a local authority, at any rate in regard to its sewerage works." On the facts of this particular case it was observed that the corporation could not dam back the sewage without causing a fearful nuisance in the city itself. What is more, this was an attempt by the courts to dictate to a local authority the

order in which and the time when they should tackle the various problems which confronted them. Alternatively it was suggested that since the corporation could not enlarge their sewerage works without a building licence the issue of an injunction was an improper attempt to influence the Minister in deciding the priority of licences. But the Court of Appeal remained unmoved. These might be proper considerations to take into account in suspending the injunction (Harman J. had suspended it for two years) but not in refusing it. And as for the coercion of the Minister, the Court of Appeal was satisfied that the Minister would continue to perform his duty with the single aim of securing the national benefit, though the injunction would serve to remind him that the situation at Derby was serious.

The fact that exaggerated privileges were claimed for the corporation, in language faintly reminiscent of a Caroline law officer arguing in favour of ship money, tended to obscure a very real general problem that lies behind this case. Vague claims of " public benefit " cannot be pleaded against a subject as a defence to tort: see *Bellew* v. *Cement Co.* [1948] I.R. 61. On the other hand, local authorities charged with performing public services and having to do so subject to stringent restrictions imposed by the central government may find themselves driven into the position of tort-feasors against their inclinations. In many cases a local authority may be able to discharge their public service at the price of paying damages, but in a case like the present where the court held that damages would not compensate the plaintiffs, and that nothing short of an injunction was an adequate remedy, the dilemma which faces the local authority is truly awful.

The defence of the authority does not call for comment. They did not, as Evershed M.R. observed, suffer from complexes about the immunity of public corporations, and the judgments in their case went on the interpretation of electricity legislation.

Of two lesser points which emerged in the course of the case one was a speculation as to the consequences which might ensue if the injunction against the corporation were not complied with, and *Mill* v. *Hawker* (1876) L.R. 10 Ex. 92 was cited. *Mill* v. *Hawker* is not strictly in point since that case turned on the liability of corporators to be sued individually for torts sanctioned by the corporation. The matter in issue in the present case is not the liability of the aldermen and councillors of Derby for the tort of nuisance, but their liability for the corporation's contempt of a court injunction. It would seem that R. S. C., Ord. 42, r. 31, is authority for attaching both the responsible city fathers and their responsible officials. To fine a corporation would merely punish the ratepayers, and sequestration of the corporation's property would be even less helpful.

The other point which emerged was, as might have been expected in the circumstances, the rule in *Rylands* v. *Fletcher*. The present

case being as plain a case of nuisance as could be it is not easy to see how a reference to *Rylands* v. *Fletcher* could help, and it did give the corporation an opportunity of advancing yet one more astonishing defence, namely, that local authorities have a special immunity from the rule in *Rylands* v. *Fletcher*. There is, of course, no such immunity as a local authority, though the fact that the accumulation of the dangerous things is done under statutory authority may be material.

It is strange to consider that though nearly a century has passed since *Rylands* v. *Fletcher* was decided, its relation to other forms of tort liability is held to be uncertain. Winfield's synthesis of nuisance and *Rylands* v. *Fletcher* liability as intersecting circles (4 Camb.L.J. 192) must now be read in the light of *Read* v. *Lyons* [1947] A.C. 156, and it is difficult to escape the conclusion that *Rylands* v. *Fletcher* did little more than underline the fact that nuisance is a tort of strict liability, with the possible addendum that an isolated escape of a thing liable to do damage will found liability though it lacks the continuance which is the mark of a true nuisance. But where a defendant has polluted a river over a considerable period there is a highly developed law of nuisance to apply to the facts of the case, and to drag in *Rylands* v. *Fletcher* "darkeneth counsel by words without knowledge."

F. H. Newark.

The Trespassing Child

If it is accepted that a predominant function of the law of torts is the balancing of competing interests, no better example of that function could be taken than the limited rights of a trespasser against the occupier of land whereon the trespasser has been injured; more particularly where the injured trespasser is an infant.

The primary interest of an occupier of land is in using and enjoying it at his will. But society may be unwilling to allow such unrestricted freedom if it endangers the lives and limbs of its young, albeit wilful, children, who trespass on that land and are injured by some mischievous device to be found there.

It cannot be denied that in practice the traditional classification of entrants on to the property of another as contractees, invitees, licensees and trespassers, produces some anomalous results.

On the other hand, in dealing with the problem of trespassing children the extent of judicial protection must be limited at some point between the "humanitarian" and the "Draconian" extremes (*per* Scrutton L.J. in *Liddle* v. *Yorkshire* (*North Riding*) *C. C.* [1934] 2 K.B. 101 at 110). Within this limited context, it is submitted, the English and American courts have evolved guiding principles which establish a fairly satisfactory compromise.

Edwards v. *Railway Executive* [1952] 2 All E.R. 430 (H.L.) is merely a modern illustration of the application of those guiding

principles. The facts of the case were simple and hardly in dispute.

A local authority's park and children's playground adjoined a section of the Southern Region electric railway. A fence (erected and maintained by the railway authorities in accordance with their statutory duties) divided the playground from the railway embankment. It was established that for many years, children had been known to break through the fence (consisting of concrete posts to which strands of wire were fixed by split-pins) by pulling out the pins and trampling down or breaking the wire. The object of this enterprise was to gain access to the sloping embankment from the top of which the children, on pieces of tin and the like, "tobogganed" back towards the fence. As often as the fence was broken it was repaired by a railway worker and a local authority employee who was in charge of the playground. Moreover, there was evidence that on the morning of the day in question the fence was in good repair.

The infant appellant, then aged nine, went with three other boys through the fence in search of a ball and in response to a challenge by the other two, he and a companion climbed the embankment and crossed the railway lines. Having abandoned their search for the ball, they returned over the lines towards the recreation ground. The companion crossed successfully but the appellant slipped and fell between the rails where he sustained electric burns and shock from contact with the live rail. His right arm, which remained stretched across the line, was amputated by a train which passed over it—the driver failing to notice the boy.

At first instance, Jones J. had ruled that there was evidence of negligence and implied licence to go to the jury and, in the event, the injured boy was awarded £6,000 damages against the Railway Executive. The jury found that the injured boy was not a trespasser on the railway lines, but an implied licensee and that his injuries were due to a trap or object of attraction, *viz.*, the live rail and the toboggan slide, which he found there and to which he had been exposed by the servants of the Executive.

The Court of Appeal (Singleton and Morris L.JJ., and Roxburgh J.) allowed the Executive's appeal on the ground that there was no evidence on which the jury could find as they did. Even if a licence could be implied with respect to the children sliding down the embankment, none could be inferred for a child trespassing on the actual railway lines.

The House of Lords (Lords Porter, Goddard, Oaksey, Morton of Henryton and Reid) unanimously upheld the decision of the Court of Appeal.

It will be appreciated that the question before the court was whether there was sufficient evidence to categorise the appellant as a licensee, as distinct from a mere trespasser, *vis-à-vis* the property of the Executive.

In English law, " . . . the line that separates each of these classes (*viz.*, invitees, licensees and trespassers), is an absolutely rigid line . . . a judge must decide . . . (into which category a particular case falls), . . . and, having decided, then the law of that category will rule and there must be no looking to the law of the adjoining category " (*per* Viscount Dunedin in *Addie* v. *Dumbreck* [1929] A.C. 358 at 371).

It was to be expected that an attempt would be made to equate the instant case with *Cooke* v. *Midland Great Western Ry. of Ireland* [1909] A.C. 229, where the habitual acquiescence of the defendant company's servants in the trespassing of children into a field and on to a turntable was sufficient to raise an injured child from the category of a mere trespasser to that of an implied licensee.

However, *Cooke's Case* was rigorously qualified and limited by two of the learned Lords. Lord Porter said (*ibid.*, at p. 434) that implied assent to use premises, arising from unrestricted user, will not be lightly inferred. " In *Cooke's Case* there was an open and well worn pathway leading to a turntable on which children could ride and which was an allurement to them. Apparently, the whole station staff in that case knew of the practice of children to congregate there and ride on the turntable and no attempt was made to stop them."

Lord Goddard C.J. (at p. 436) described *Cooke's Case* as " that hard-worked case . . . which was, in fact, decided on points as unusual and special as any could be."

The main argument for the appellant in *Edwards' Case* was that, in failing to take proper steps either to prevent children from going on to the embankment and the lines or to warn them of the danger of so doing, the Railway Executive were permitting children to enter their premises as licensees. This argument was rightly rejected. Lord Porter (*ibid.*, at p. 435), while not convinced that it had been established that the Railway Executive knew that children went on to their property, was prepared to affirm that " even assuming that the respondents had knowledge of the intrusion of children on to the embankment, the suggestion that that knowledge of itself constitutes the children licensees, in my opinion, carries the doctrine of implied licence much too far. . . . I do not accept the theory that every possible step to keep out intruders must be taken and, if it is not, a licence may be inferred."

A subsidiary argument was that the driver of the train had been negligent, *i.e.*, recklessly negligent, in failing to see the boy, but on the evidence the court held to the contrary. Therefore the limited protection which is owed even to a trespasser (*Mourton* v. *Poulter* [1930] 2 K.B. 183) was not available.

While *Edwards' Case* is unassailable in so far as the Railway Executive was concerned, the fact that the local authority, which was responsible for the children's playground, escaped liability is surely open to criticism. In the appeal to the House of Lords the

child's claim against the local authority was not pursued since it had been dismissed both at first instance and in the Court of Appeal.

Having regard to the present state of the law concerning defective premises, it was inevitable that this should be so. The occupier of property prima facie owes a duty of care to ensure that his premises are safe—a duty which varies in strictness according to the particular category into which the entrant can be placed. The duty may be as high as in *Maclenan* v. *Segar* [1917] 2 K.B. 325 (though it may vary according to whether a guest is inside the hotel building or outside in the grounds; see *Bell* v. *Travco Hotels, Ltd.* [1953] 2 W.L.R. 556), or as low as in *Mourton* v. *Poulter, supra.* But this branch of the law of torts is concerned only with defects *on* the premises of the defendant and not with those on the premises of his next door neighbour.

Nevertheless, it is suggested that in view of the flexibility of the tort of negligence—" the categories of negligence are never closed "—it should not have been difficult for the courts to have found a duty of care on the part of the local authority to take reasonable steps to prevent children from " escaping " from the playground on to the railway embankment—a practice of which they were fully aware.

For while it would be impracticable to suggest that the Railway Executive should be under an obligation to seal off all their lines from marauding children, the same considerations should not apply to a local authority who create and maintain a children's playground which *adjoins a railway line* for a distance of *1,000 yards.* It would seem indisputable that the local authority *should* be under a duty to prevent injuries to children which might have been avoided if the local authority had erected a tennis-court type of fence between the railway and their recreation ground.

In the present state of the law, however, there would seem to be no such duty and to that extent the law must be regarded as defective.

Eric C. E. Todd.

REVIEWS

Principles of Administrative Law. By J. A. G. Griffith, LL.M., Lecturer in Administrative Law in the University of London, of the Inner Temple, Barrister-at-Law, and H. Street, LL.M., PH.D., Senior Lecturer in Law, University of Manchester, Solicitor of the Supreme Court. [London : Sir Isaac Pitman & Sons, Ltd. 1952. xxxiii and 316 pp. 80s.]

This is the first textbook to be published on English Administrative Law. The need for such a book has long been felt, and our thanks are due to Professor Street and Mr. Griffith for so ably filling this gap on our shelves. It will be welcomed as a manual by all teachers of Constitutional Law and Administrative Law and all students of Administrative Law, and as a reference book for the keener student of Constitutional Law. In the introductory chapter the learned authors discuss the various English definitions of Administrative Law, and accept that of Sir Ivor Jennings that it is "the law relating to the Administration. It determines the organisation, powers and duties of administrative authorities." They wisely do not attempt to draw any definite distinction between Administrative Law and Constitutional Law : it is a matter of convenience and emphasis. They say in the Preface that "Administrative Law is now a strong claimant for the status of a compulsory subject in legal education." We agree that the study of Constitutional Law should be compulsory, and that sufficient emphasis should be placed on the Administrative Law aspects; but we do not think there is room for Administrative Law as a separate compulsory subject in the undergraduate curriculum. In countries where the study of Constitutional Law is limited by a written Constitution the answer may well be different. The main topics of the book are—as we should expect—the legislative, administrative and judicial powers of the Administration, and the Parliamentary and judicial control of each, with a final chapter on Public Corporations. There is one important omission, namely, Local Government, an intentional exclusion which is justified by the fact that this branch of public law has been adequately covered in other books. References to local authorities keep on breaking in; and, of course, the student must remember that on any definition of Administrative Law the law relating to local authorities forms an important part of that subject. Mr. Griffith wrote the first draft of the chapters on legislative powers and public corporations, and Professor Street wrote the first draft of the chapters on administrative and judicial powers and suits against the Administration; but we are not invited to distribute praise and blame between the two collaborators.

The work is thorough, reliable, sound in generalisation and accurate in detail. Eschewing polemics, the authors approach the underlying political problems in a detached and objective way. Illustrative examples are generously provided by way of cases, statutory provisions or descriptions of institutions, and these are interspersed with illuminating but not excessive statistics. References to practice sometimes supplement the strictly legal sources. The respect shown for judicial authority is unusual in writers of this branch of law. The learned authors always try faithfully to state the principles which the courts appear to have laid down, instead of condemning the judges for not deciding as they themselves would have done. This does not mean that they evade difficulties; but where two cases seem to be inconsistent they try to reconcile them instead of denouncing both as wrong.

Among the passages which strike us as being particularly helpful are the analysis of the definition of Statutory Instruments, especially as regards

powers to make statutory rules conferred before the Statutory Instruments Act, 1946, came into force (pp. 44–52); the discussion of sub-delegated legislation (pp. 55–56, 61–69); and the critical summary of the various types of administrative tribunals (pp. 188–95), after a courageous attempt to give a general description of their composition and powers (pp. 158 *et seq.*). The point is well made that the cases of *Errington, Robinson, Johnson* and *Franklin* were decided on the interpretation of the statutes concerned (p. 178), and the authors are probably right in thinking that the *Franklin Case* does not overrule the *Errington Case* (p. 177). It is true that the House of Lords affirmed the Court of Appeal in *Franklin's Case* (p. 176), but they did so on a different ground. The principle relating to prerogative legislation for Colonies is for once correctly stated (p. 104), though the authority for it in its modern form is not *Campbell* v. *Hall* but *Sammut* v. *Strickland*. The Lands Tribunal is thought to be admirably devised (p. 161), but the Rent Tribunals are not regarded as satisfactory (p. 164). The decision in *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw,* which caused some excitement, is put into proper perspective by the reminder that few tribunals are compelled to make a full record (p. 214). Whether public corporations are Crown servants for purposes of civil liability and proceedings the authors think depends on the degree of control exercised by the Government, and this view leads to the suggestion that the Central Land Board and the Agricultural Land Commission are Crown servants, that Regional Hospital Boards are probably Crown servants, and that the position of the New Town Development Corporations is uncertain (pp. 247–48, 299–302). It may be that a contractual relationship exists between statutory undertaker and consumer (p. 258), but we are not convinced that Departments which were incorporated before the Crown Proceedings Act, 1947, without being expressly made suable, can still be sued otherwise than under the provisions of this Act (p. 251).

One of the less satisfactory passages is that on statutory interpretation, the principles of which it is not possible to discuss in the limited space available (pp. 100–103). Denning L.J.'s dictum in *Seaford Court Estates, Ltd.* v. *Asher,* set out here at some length, was not approved in the House of Lords, as a footnote indicates; and we derive confusion rather than help from the statement quoted from Professor Willis's article in 16 *Canadian Bar Review.* It is no longer correct to say that penal statutes are strictly construed, apart from the fact that "strictly" is ambiguous. The arrangement due to division of labour separates the discussion of the exclusion of judicial control over delegated legislation (pp. 116–119) from the similar problem relating to the judicial powers of administrative bodies (pp. 221–222). The exposition of the conceptual and functional distinctions between administrative and judicial powers at the beginning of chapter 4 will not be easy reading for the student (pp. 140–52); but this was probably the most difficult part of the book to write, and the authors must not be blamed in so far as the difficulty is inherent in the subject-matter. Among the methods of judicial review the treatment of habeas corpus is scarcely adequate, and under "action for damages" nuisance and negligence might be mentioned (p. 236). As regards the question whether statutes bind the Crown, the distinction between the statements of principle in *Tamlin* v. *Hannaford* and *Province of Bombay* v. *Municipal Corporation of Bombay* does not appear from p. 266 to be significant; in any event in the next edition account will no doubt be taken of the recent judgment of the Court of Appeal (if that is allowed to stand) in *Bank voor Handel* v. *Slatford,* where incidentally Denning L.J. states the principle differently from his statement in *Tamlin* v. *Hannaford.* The account of Parliamentary control over public corporations is rather summary (pp. 284–8), and no reference is made to the periodical reviews foreshadowed by Mr. Herbert Morrison as Leader of the House of Commons on October 25, 1950.

A misprint in the title of Winfield's *Tort* in a footnote to p. 242 might conceal a theory of civil liability. The right-hand page-heading in Chap. 5

reads "Control of the Administrative Powers," whereas the chapter also covers the control of judicial powers. If the preservation of the English language be regarded as at least as important as the preservation of English law, we may be forgiven for expressing our dislike of the following examples of modern Anglo-American jargon:— "insights" (p. *v.*); "due to" for "owing to" (p. 100); "stems from" (p. 143); "it is undertaking promotional activities" (p. 144); "factual investigatory procedures" (p. 149); "motivating decisions" (p. 149); "evaluated" (p. 152); "procedures" (p. 152); "adjudicative procedures" (p. 165); "the investigational field" (p. 187); "adjudicative processes" (p. 189); "jurisdictional excesses" (p. 190). Let us say that they are in advance of the best English usage.

O. Hood Phillips.

Modern Equity. By H. G. Hanbury. Sixth Edition. [London: Stevens & Sons, Ltd. 1952. xl and 774 pp. £3 3s.]

An Introduction to Equity. By G. W. Keeton. Third Edition, [London: Sir Isaac Pitman & Sons, Ltd. 1952. xxxvii and 376 pp. £2 5s.]

Both these new editions maintain the high and exacting standard of scholarship which the teacher of Equity has been accustomed to demand in his textbooks.

On this occasion, *Hanbury* perhaps offers a more fruitful field for the reviewer. Having regard to the recent pronouncements from the Bench on the character and scope of English equity, the author has sought to re-assess the present relations of common law and equity in his vigorous and provocative style. He takes the view that law and equity are being carried in the direction of fusion by such decisions and dicta as those in *Central London Property Trust* v. *Hightrees House, Ltd.* [1947] K.B. 130, and *Solle* v. *Butcher* [1950] 1 K.B. 671, though he considers that *Winter Garden Theatre* v. *Millennium Productions, Ltd.* [1948] A.C. 173 "points in the opposite direction" (p. 24). The reader is not, however, told what is meant by "fusion" and herein lies the difficulty.

Maitland said of fusion: "The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law: suffice it that it is a well established rule administered by the High Court of Justice." The criterion would seem to be simply that law and equity are fused where in a given situation no one is concerned to ask which branch of the law gave rise to the rule applicable thereto. *Hanbury* lends this support by quoting the 1925 legislation and the Limitation Act, 1939, as speeding the supersession by the Law of England of both common law and equity.

On this view, however, *Winter Garden Theatre* v. *Millennium Productions, Ltd.* [1948] A.C. 173, is a prime example of fusion, a case where both the "legal" and "equitable" solutions to the problems of occupational licences were discarded in favour of a new rule. What does it matter that the decision *semble* should "retrospectively bestow on equity a resource which it had not previously enjoyed"? In a developing society the sources of judge-made law cannot be confined to the period before 1875; whatever the rational process this decision is now a well-established rule administered by the High Court of Justice. On the other hand, in *Central London Property Trust* v. *Hightrees House, Ltd.* [1947] K.B. 130, and *Solle* v. *Butcher* [1950] 1 K.B. 671 (as in many other cases), Denning L.J. has found it necessary to point a contrast and conflict between the legal and equitable rules to justify a deviation from what had previously been the accepted principles. By Maitland's test, at all events, fusion has not yet come about.

Again, assuming Professor Hanbury to be correct, it is difficult to see how the scheme of settlements of land established by the 1925 legislation supports fusion in Maitland's sense, since it depends on the dichotomy between the equitable beneficial interest and the legal estate upon trust, both of which are vested in the tenant for life. The beneficial interests are no less equitable because they are established by Act of Parliament.

This discussion is not intended to decry in any way Professor Hanbury's analysis; he rightly treats the problems of fusion as fundamental to his whole subject. It is however this reviewer's submission that all students of equity would be in the author's debt if he gave his views on what fusion of law and equity means or ought to mean.

Although *Hanbury* and *Keeton* deal with the same subject, their treatment of it is very different. Professor Keeton regards equity primarily as a method of approaching legal problems, which can best be understood in terms of history. He is therefore less compelled than Professor Hanbury to make his treatment exhaustive, and consequently the new edition calls only for amendment of detail of the text, rather than for adjustment of his whole argument to meet a changing judicial temper.

This amendment of detail was, however, needful. As the 1947 edition was, due to post-war exigencies, virtually a reprint of the first edition, this is the first thorough overhaul which the book has had. It is a tribute indeed to the author how well the original material has stood the test of the intervening 13 years.

Professor Keeton, in preparing this new edition, has not merely brought the text up to date, but has embodied new matter, some of which was regarded as a serious omission from earlier editions. In particular, there are a number of new chapters dealing with equitable remedies. Originally only rectification of instruments found a place in the *Introduction*, as the publishers then intended to produce a special book in their equity series to deal with remedies alone. This book never appeared owing to the war, and the publication now of the material in a textbook dealing with the general principles of equity is greatly to be welcomed.

In addition, *Keeton* includes also new chapters on the rules of equity applicable to infants, lunatics and married women, on powers of appointment and on fraud in equity. The author has also substantially expanded his first chapter on the nature of equity in the light of the judgment of the Court of Appeal in *Re Diplock* [1948] Ch. 465. In the result the *Introduction to Equity* is not only as good as ever, but is greatly enhanced in usefulness as a students' textbook.

A subsidiary (though important) point is the high standard of textual accuracy displayed in *Keeton* which reflects the greatest credit on everyone concerned.

There is however a further matter. The reviewer feels bound to comment on the comparative layout of the two books, and in particular on the indexes and annotations. *Keeton's* index includes references to cases while *Hanbury's* does not. This omission can cause inconvenience to the reader using the book as a work of reference, since it is necessary always to turn to the actual text to find the case reference.

The question of annotations is, however, much more important. It is difficult to resist the impression that (with the best of intentions) *Hanbury* is over-annotated. Constant references in the text to footnotes distract the reader even if the footnotes are important (as of course they often are in *Hanbury*, since the author frequently embodies subsidiary arguments in them). All too often, however, the footnotes consist of needless or obscure cross-references to the text, or several references used where one would have done. (See for example on the first point p. 107, n. 89; p. 109, n. 98; p. 218, n. 1; p. 226, second part of n. 49; p. 563, n. 26; on the second point pp. 35–36, nn. 23–25, and p. 119, nn. 34–36.) These tendencies, though to be found throughout, are particularly noticeable in the first 120 pages or so.

In addition there are a regrettable number of inaccuracies among the notes in *Hanbury*. On pp. 14 and 18, notes 42 and 62 respectively refer the reader "*post*" without stating the page to which he is referred; p. 41, n. 52 should refer to p. 444 not p. 400; on p. 55 the references 52A to 53B are confused by the omission of letters after the number of the note both in the text and in the footnotes, and on p. 102, notes 50 and 52 refer to p. 662 instead of to p. 632. Wrong references are to be found to cases: on p. 223, n. 31, *Gibson* v. *South American Stores* is referenced [1950] 1 Ch. 226 instead of Ch. 177; on p. 239, n. 39, *Williams' Trustees* v. *I. R. C.* is given as [1939] instead of [1947] Appeal Cases, and in the following note a page reference is given to Lord Normand's speech in that case but without specifying in what case or in what report the speech is to be found; on p. 657 (indexed to p. 658) *Ministry of Health* v. *Simpson* is noted as [1941] instead of [1951] Appeal Cases. *Re Diplock* itself is variously given *Law Reports* and *All England Law Reports* references, and p. 716, n. 61, refers simply to *Re Diplock* without mentioning that the reference was to *Simpson* v. *Lilburn* and not to *Diplock* v. *Wintle*. Compare also the various references to *Reading* v. *Att.-Gen.* [1951] A.C. 507 on pp. 186, n. 98; 709, n. 24; and 715, n. 60.

Similar inaccuracies appear occasionally in the text also. The cases quoted on p. 227, n. 51, do not support the text, the decisions in four of them being contrary to the text while the fifth (*Re White* [1893] 2 Ch. 41) does not appear to be relevant. The same criticism applies to p. 241, n. 50.

These are perhaps small matters, but the errors quoted are in most cases samples only. A law book must be accurate and surely mechanical accuracy is not too difficult to secure. They are unnecessary errors and they unhappily and inevitably detract from the value of a book which has very many outstanding merits.

Hamish R. Gray.

Carver on the Carriage of Goods by Sea. Ninth Edition. By Raoul P. Colinvaux. [London: Stevens & Sons, Ltd. 1952. cviii and 1182 pp. £6 10s. net.]

Its convenient form and the immense authority of its author, not to mention the eminence of its editors—it appears to afford a sure passport to the bench if not to the House of Lords—has given to *Scrutton on Charter-parties and Bills of Lading* a precedence over Judge Carver's much more detailed and readable study which it hardly deserves. Carver never had Scrutton's position at the Bar, which meant that he had more time to lavish on his *magnum opus*, but he had a substantial practice which gave him the familiarity with the business of shipping which is so necessary to make a success of a book of this sort. Carver has been well edited, among those who have accepted this responsibility being the present Lord Wright, and this tradition has been worthily maintained in the present edition by Mr. Colinvaux, who is to be congratulated on a good job.

The editorial work is not only excellent, but pretty extensive: for Mr. Colinvaux has carried through a number of substantial rearrangements of the contents and has added several additional sections, notably an excellent new chapter on Frustration and Illegality, which replaces the rather cursory treatment afforded to this subject in the earlier editions. Although *Carver* is approaching its seventieth birthday there is not much dead wood in it, and the amount of pruning achieved by Mr. Colinvaux is small. The result is that an already bulky volume has increased by some 50 pages—it has now reached a portliness which makes it tiresome to handle and when a division into two volumes has become desirable.

The most important of the rearrangements is the shifting of a good deal of material out of the first chapter which deals with the common law responsibility of the carrier, and out of the third chapter which deals with the carriage

in a general ship into a new fourth chapter entitled Responsibility for Cargo. This gives a more logical treatment of the subject and seems to me to be an improvement.

Of the new material the detailed commentary on the Carriage of Goods by Sea Act, 1924, calls for particular mention. While this is excellently done the method employed seems to me open to objection. This Act modifies the law in relation to bill of lading contracts in a large number of important respects, and I prefer the method of the late editors which was to deal with each modification as it arose in connection with its particular topic in the text, after giving a general introduction to the subject at an early stage. As it is one has to keep on looking in two different parts of the book for the law on one subject; for example, seaworthiness, or the carrier's liability in respect of admissions made in the bill of lading as to quantity or quality of the cargo. This difficulty Mr. Colinvaux tries to overcome by cross-referencing, not always with complete success, *e.g.*, in the case of deviation where the section on justifiable deviation seems to contain no cross-reference to the important provisions in the Act relating to this matter. Incidentally, it is rather clumsy to commence the general section on justifiable deviation with the subheading Deviation to Save Property, which is the most glaring case where the common law refused to accept a reason which most people would regard as sensible as justifying deviation. And it is here of course that a cross-reference to the 1924 Act was particularly called for. Apart from this the chapter on deviation is much improved. Mr. Colinvaux is always ready to express his own view, even if it is against the current of opinion, as with his contention, with which personally I am in agreement, that deviation does not avoid the contract *ab initio*, so that the carrier is entitled to rely upon the exceptions in his contract to protect himself against casualties which occurred before the deviation took place.

Mr. Colinvaux has also rewritten a good deal of the chapter on charter-parties, has inserted a section on implied terms under *The Moorcock*, 14 P.D. 64, and other decisions where that case has been applied, and an important section on c.i.f. contracts, a type of sales contract into which the carriage element enters so intimately that it is really necessary that it should be more effectively dealt with in a book of this kind than had been the case in previous editions. The article in *Scrutton* on the subject has always been regarded as one of the best short statements of the law. I like Mr. Colinvaux's treatment of this difficult topic; but I do not think that the judgment of McCardie J. in *Diamond Alkali* v. *Bourgeois* [1921] 3 K.B. 443 is so "unusually unsatisfactory" as he makes out. The date on a shipped bill of lading is a matter of vital importance to an importing merchant more often than not. In the case of a received for shipment bill he has nothing that he can rely upon, and while a clear usage of trade may of course make the tender of such a bill of lading good, it seems to me that something more than a mere practice is required to remove the importer's right to a shipped bill, despite the *obiter dicta* of Bankes L.J. in *Weis* v. *Produce Brokers* (1921) 7 Ll.L.Rep. 211, which supports the view contended for by Mr. Colinvaux.

One of the most useful features of *Carver* has always been the extensive citation of the American authorities. Mr. Colinvaux has well maintained this tradition, and a substantial number of his 500 new citations are of American decisions. Often he goes further, and gives them as full a discussion as if they came from English courts. As he says in his Preface "the both to blame collision clause," which is of course often found in English bills of lading, is really only intelligible in the light of the American cases. There have been several recent English decisions of high importance on various points. As far as I have been able to check them these are all well dealt with, except that if the insurance cases on the application of *causa proxima* to "warlike operations" are to be mentioned it should also be stated that *The Coxwold* [1942] A.C. 691, completed the process of freeing the *causa proxima* rule from the rather narrow interpretation which had been earlier put upon it.

I should like to mention the much improved index which it is a pleasure to use, and also the removal of the chapter analyses from the heads of the chapters to the contents pages, which on the whole I prefer.

C.

Pollock on the Law of Partnership. Fifteenth Edition. By L. C. B. Gower, LL.M., Solicitor, Sir Ernest Cassel Professor of Commercial Law in the University of London. [London: Stevens & Sons, Ltd. 1952. xxxv and 244 (with index) 25 pp. 25s. net.]

Pollock on Partnership was first published in 1877 and became in its fifth edition an edition of an Act of Parliament while preserving most of its original substance. It is surprising what little change there has been in the law of partnership since the passing of the Partnership Act, 1890, when the drastic alterations in almost all other branches of the law are borne in mind. This is probably because partnership has been developing rather in the direction of the private company and reform in the law relating to persons carrying on business in common has been confined to company law leaving the older form of association virtually untouched. In the 80 years which have passed since this book was first written, however, there has inevitably been a change of emphasis in the relative importance of the different parts of partnership law and of their relation to law in general. It was therefore time that the opportunity should be taken, as has been done in this edition, to delete matter which is no longer of interest and to substitute new material more suitable to the requirements of the modern reader. Professor Gower is to be congratulated in the way in which he has discharged this task so as to leave the book still *Pollock on Partnership* and not to transform it into *Gower and Pollock on Partnership.*

Pollock's original bill provided for the compulsory registration of partnerships. This provision was dropped at an early stage when the bill was before Parliament but, as Professor Gower shows, it has now virtually become part of the law by the Registration of Business Names Act, 1916, as amended by the Companies Act, 1947. The Business Names Act has been an unfortunate piece of legislation in that, so far, it has never been consistently enforced. Starting as a piece of wartime legislation during the first world war, its object was to compel the disclosure of the original name and nationality of a business man who had changed his name and nationality. With the end of that war, this object became of dwindling importance until it was finally repealed by section 116 of the Companies Act, 1917. The main provisions of the Business Names Act, however, still remain in force and their importance in relation to partnerships is very properly emphasised in the present edition. The text of the Act, briefly but adequately annotated, is set out in the appendix and adds to the value of the book.

Of the main part of the work it is unnecessary to say more than, as might have been expected from the present editor, it is thoroughly brought up to date and the cases decided since the last edition added. There is a short note on the drafting of medical partnership agreements, the work of Mr. A. Goodman, which will be helpful to those having to advise on the effect of the National Health Service on medical partnerships. In its new form the book will be of great assistance to students and practitioners.

The criticism by one reviewer of the last edition of the continued use of the word "Indenture" in the precedents has apparently not been accepted, as this pre-1926 term is still retained. It is a matter for consideration whether an arbitration clause should always be included in a precedent of a partnership agreement as a matter of course. If the partners want to arbitrate they can always do so whether the clause is in the agreement or not,

but the clause is sometimes a handicap when action has to be taken quickly against a partner who is acting or threatening to act in breach of the partnership agreement.

J. Charlesworth.

Coulson and Forbes on the Law of Waters. Sixth Edition. By S. Reginald Hobday, o.b.e., of Gray's Inn, Barrister-at-Law. [London: Sweet & Maxwell. 1952. lx and 1320 pp. (including index). £8 8s. net.]

The last edition of *Coulson and Forbes* was published as long ago as 1933, a gap wide enough to have produced a generation of practitioners unfamiliar with the work. For them especially the best service a reviewer can perform is to indicate the range of subject-matter comprised in the present edition. There are chapters on the Sea, including a useful discussion of the law relating to the foreshore; on Inland Waters; on Natural Rights relating to water; on Acquired Rights, mainly a matter of easements; on Canal, Docks and Water Supply, a conglomeration of topics as artificial as the subjects themselves; on Fisheries, both sea and freshwater; on Navigation; on Ferries and Bridges; on Tolls and Rating; on Remedies. Finally, there is a long and detailed Second Part dealing with Land Drainage. The first two appendices are devoted to a reprint, with annotations, of several modern statutes, including the Land Drainage Act, 1930, the various Agriculture (Miscellaneous Provisions) Acts and the Rivers (Prevention of Pollution) Act, 1951, and of a large number of relevant Rules and Orders.

There is a marked, though no doubt, inevitable, difference in style between the humdrum, dull, accurate account of statutory topics and the generous discussion of the basic common law, full of curious points and ancient rules, long delightful extracts from learned judgments, good armchair browsing, redolent of Victorian leather and of the days before learning was replaced by the card index. We feel it almost heretical to hint that spaciousness involves space, and that it must be purchased at a high price even by those to whom Schedule D is an open book. But we feel we are on firmer ground in suggesting that much of the chapter on Easements of Water could safely be replaced by appropriate references to books on the general law of Easements. There is an inevitable tendency to discuss such topics as the acquisition of easements by reference mainly if not solely to reported cases dealing with water, and this can easily give an incomplete, and therefore dangerous, picture of the basic rules. So, section 62 of the Law of Property Act, 1925, receives merely an incidental mention, no doubt because the reported cases in which this section has been discussed have so far had nothing to do with water (though note the important case of *Long* v. *Gowlett* [1923] 2 Ch. 177, which is not referred to on this, the main point of the decision).

It would be presumptuous for a reviewer to determine *ex cathedra* how far Mr. Hobday has succeeded in his editorial duties. No doubt each reader will come across minute points of omission—such stuff as reviews are made of ("It is surprising to find a discussion of foreshore rights without mention of the proviso to section 4 (1) of the Limitation Act, 1939. . . . The curious omission of the curious case of *Re Simeon and the Isle of Wight R. D. C.* [1937] Ch. 525, in the matter of percolating water. . . . The anxiety of a wharfinger, brooding over his duty to provide safe berths, might have been somewhat eased by a footnote reference to *The Majford* [1942] P. 43, 145 . . ," etc.). But this kind of thing is merely a specific application of the general rule that no textbook is a complete substitute for an efficient case digest, and review editors might well consider printing this rule in each issue at the head of their review columns. Omissions of this kind are relevant only if their accumulation becomes evidence of incompetence, and nobody is likely to raise this charge

against the present editor. Suffice it to say that such portions of *Coulson and Forbes* as we have read we have read with interest and often with pleasure, and on such points of detail as we have consulted the text we have received adequate information and enlightenment.

A. D. Hargreaves.

An Introduction to Evidence. By G. D. Nokes, Reader in English Law in the University of London. [London : Sweet & Maxwell, Ltd. 1952. xxxii and 427 pp. 30s.]

Phipson on the Law of Evidence. Ninth Edition. By Sir Roland Burrows, Q.C. [London : Sweet & Maxwell, Ltd. 1952. clxxxv and 758 pp. £4 10s.]

Roscoe's Criminal Evidence. The Law, Evidence and Practice in Criminal Cases. Sixteenth Edition by His Honour Judge A. A. Gordon Clark and Alan Garfitt, LL.B., Barrister-at-Law. [London : Stevens & Sons. 1952. lxxvi and 1068 pp. £6 6s.]

There appears to be no immediate prospect of a "restatement," not to speak of codification of the "tangled web" of the law of evidence, however desirable this might be. While awaiting the setting up of a committee which will investigate the whole subject (which was advocated, for instance, at least so far as civil matters are concerned, by the Royal Commission on the Dispatch of Business at Common Law, 1934–36), the publication of a new book which surveys the present position is bound to be received with special interest.

Mr. Nokes' *Introduction to Evidence* is in the first place intended for students and exposition must therefore clearly take precedence over the niceties of critical analysis. As it is, arrangement and sequence alone raise difficult problems and, since the law as it stands is hardly to be understood except by reference to the way in which it has grown during the past 300 years, the author wisely gives considerable space to the historical background. The result is a comprehensive survey, both readable and concise, and this is achieved without any over-simplification. Authority by way of decided cases is given for almost every single statement in the text, recent decisions are very fully noted, yet, though altogether something like 2,500 cases are referred to, the footnotes are not over-loaded. Within the limits of available space, Mr. Nokes has taken account of relevant discussions in the leading English legal quarterlies and other modern literature.

The complexity which surrounds many rules of the law of evidence is perhaps best exemplified by the fact that one whole separate part of this book, amounting to almost one quarter of the text, is devoted to the technicalities involved in the admissibility (or otherwise) of hearsay evidence alone. But unlike other current textbooks and treatises on the law of evidence, this admirable, up-to-date *Introduction* does not plunge into detail in order to avoid, as far as possible, statements of general principle. On the contrary, each chapter of the two main sections of the book, concerned with the "Admissibility of Facts" and the "Means of Proof" opens with some over-all considerations, and if these are occasionally controversial, they are invariably carefully reasoned.

In the face of so welcome and so impressive an achievement, there is very little room indeed for any but positive comment. Once or twice, perhaps, Mr. Nokes is not very happy in his terminology, as in the vital discussion of the relation between relevance and admissibility of evidence (pp. 67 *et seq.*), where his definition of relevance forces him to the conclusion that "irrelevant

facts may be admissible." The two terms have indeed often been carelessly used, not least by the courts, and sometimes are even treated as synonymous; all the more reason why the term "admissible" should never be employed except in its strictly technical sense and even sentences like the following (on p. 141) "Expert evidence is not *admissible* when the tribunal is competent to decide the matter in dispute without assistance" strike one as unfortunate. Admissibility is always a question of law, but certain evidence offered and admissible may be excluded at the discretion of the court for various reasons, including incidentally those given by the Court of Criminal Appeal in *R.* v. *Shellaker* (a case quoted, but not on this important point).

In his Preface to the last edition of *Phipson's Evidence* prepared by him (the ninth), Sir Roland Burrows wrote not many months before his death: "I am strongly of opinion that the rules of evidence should be reconsidered in the light of modern conditions. . . . Is it right to consider them as enabling, so that nothing is to be considered admissible unless there is a rule which makes it admissible, or, on the other hand, is the right approach that everything that is relevant is prima facie admissible unless there is a rule which excludes it?" It was hardly to be expected that such a radical departure from the established line should have been undertaken in this new edition, which will always stand as a monument to the learned editor's vast knowledge of the subject. Nonetheless, whether in the future the old arrangement of *Phipson* is to be maintained or not, it is to be hoped that a thorough pruning will be carried out of some of the irreconcilable cases which still stand facing each other to the bewilderment of the reader (a good typical crop is found, *e.g.*, on Inducement to Confession on pp. 273–278). At present it is difficult to avoid the impression that *Phipson* harbours a considerable number of ancient decisions which, though never formally overruled, would never be quoted, not to mention followed, today.

To some extent the same objection of rather uncritical enumeration must also apply to the new edition, the first for almost 25 years, of *Roscoe's Criminal Evidence*. To give but one instance almost at random: full discussion of evidence after verdict but before sentence refers both to *Campbell* (1911) 6 Cr.App.R. 132 and to *Van Pelz* (1943) 29 Cr.App.R. 10, which definitely modified the very dicta by Alverstone L.C.J. in the earlier case which are here quoted. There are some rather sweeping statements, given without explanation or authority; on p. 28, for instance, we read "where there is a presumption that hearsay evidence is true, it is admissible" or on p. 306 "long sentences are coming back into favour—a result of . . . inability to order corporal punishment." Despite the incorporation of much new matter, *Roscoe* seems to carry the past as a rather heavy load round its neck; it is sometimes not until one comes to the end of a whole paragraph or section that it is possible to tell what the law is, as opposed to what it was. Some branches of the law which are gaining increasing significance in modern conditions are rather cursorily treated here (*e.g.*, Expert Evidence, pp. 155–157) and rather surprisingly the Table of Statutes in *Roscoe* (and in *Phipson*) contains no reference to section 19 (*a*) of the Criminal Appeal Act, 1907, which gives power to the Home Secretary to refer a case back to the Court of Criminal Appeal for the consideration of fresh evidence and was used more than once of late.

It is for its alphabetical digest of evidence of crimes which makes up the bulk of the work that *Roscoe's Criminal Evidence* will be chiefly welcomed by practitioners. The system of cross-references, on which its value in practice must largely depend, is carefully carried through, except that there are perhaps rather numerous passages in the text which—by a curious circumlocution—refer the reader not to the appropriate section or page of the book, but baldly "See Index" (and even here, if he happens to look for "Burden of Proof," he will not obtain satisfaction until he has reached "*Onus Probandi*").

H. A. Hammelmann.

Odgers' Principles of Pleading and Practice. Fourteenth Edition. By L. F. Sturge, of the Inner and Middle Temples, and the Midland Circuit, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1952. liv and 476 pp. (including index). 35s. net.]

This is the first edition of this well-known student's textbook to come from the hands of someone other than its distinguished author or his equally distinguished namesake, and it is therefore of considerable interest. Mr. Sturge is not exactly a newcomer to the book, as he participated in the preparation of the thirteenth edition in 1946. Moreover, he already has to his credit excellent editions of *Cockle's Evidence* and *Stephen's Digest of the Criminal Law*. It is with confidence therefore that one turns to the new edition of *Odgers*, for one feels sure that the publishers have found in him a person who will enable the usefulness of the book as an introduction to the principles of pleading and practice to be retained if not indeed enhanced.

This confidence is in no way misplaced. The present edition contains several new features. Not only is Chancery procedure and practice outlined for the first time, in two short chapters contributed by Mr. Raymond Walton, but here and there in the other parts of the text new paragraphs have been introduced, designed, so the Preface informs us, "to give a practical turn to the matters under discussion in the hope that this work may be of value, not only to the student, but also to the junior practitioner." These are indeed most valuable innovations. The result is that the text has been lengthened by 46 pages, but space has been saved elsewhere by improvements in the layout of the Tables of Cases and Statutes, and the Index, so that the book is not inordinately expensive.

The effect of the Crown Proceedings Act, 1947, and the Legal Aid and Advice Act, 1949, is explained at the appropriate pages, and the relevant provisions of other recent statutes, such as the Companies Act, 1948, are referred to. Also recent cases have been noted where necessary. The general impression is that Mr. Sturge has done a sound piece of work, and that the present edition of *Odgers* is one of the best, if not the best, ever.

J. E. Hall Williams.

The British Commonwealth: The Development of its Laws and Constitutions. General Editor: George W. Keeton. Vol. 2: The Commonwealth of Australia. By G. W. Paton, M.A., B.C.L., and others. [London: Stevens & Sons, Ltd. 1952. xvi and 855 pp. £2 15s. net.]

The publication of a series of works on the development of the laws and constitutions of individual Commonwealth countries is an excellent idea which reflects credit upon its sponsors. The series could fill a gap in our literature on comparative law and Commonwealth studies and at the same time attract the general reader. One views the volume on Australia with mixed feelings, for its content as well as its price may restrict its appeal in this country to a relatively small circle of readers. But no serious student of comparative law will ignore it, and even the most resolute of Little Englanders among lawyers must find his curiosity quickened by an examination of the experience of Australia in the evolution of its common-law system.

Professor Paton was able to select a strong team of academic lawyers and practitioners, reinforced by a Professor of Agriculture and a social scientist, to assist him. Their task was difficult; they were expected to write a general survey of developments not only at the Federal level but also in the six States.

It is not surprising that some of the contributions to this symposium resemble collections of fragments rather than finished essays. Most of the authors have acted on the assumption that the reader is already conversant with the corresponding rules of English law so that they need emphasise only the main points of dissimilarity between English and Australian rules; this accentuates the tendency towards jerkiness of style. Given twice the amount of space the authors might have produced between them a work that was twice as good as the present one, for all its merits.

Part I comprises a broad introductory survey by Professor Paton (which does not wholly come up to expectations), a brief review of private international law by Mr. P. D. Phillips, and chapters on constitutional law by Professor Geoffrey Sawer and administrative law by Professor W. Friedmann. Professor Sawer has chosen to focus attention upon some of the most difficult problems of constitutional interpretation, which he subjects to an acute analysis, rather than attempt to cover the whole field in an inadequate number of pages. Professor Friedmann has contrived to say something of interest about most of the important issues without leaving any impression of superficiality. In Part II there are chapters on real property (including an account of the Torrens system of land registration), family law, succession, procedure and pleading (an outstandingly good essay, written by Mr. F. C. Hutley), and the organisation of the legal profession. This last chapter is followed by an excursus, prompted by Professor Gower's article in this *Review* (13 M.L.R. 137) and giving an account of the special problems of legal education in Australia and the solutions attempted in the University of Melbourne. Part III is a survey of legislative intervention in the life of the community, covering the rural economy, mercantile law, industrial law and the social services. The work concludes with a useful brief bibliography of Australian law.

S. A. de Smith.

Manual of German Law. Vol. I: General Introduction, Civil and Commercial Law; Vol. II: Private International Law, Civil Procedure, Criminal Law, Criminal Procedure. [London: H.M. Stationery Office. Vol I. 1950. xxvi and 297 pp. 25s. Vol. II. 1952. xv and 167 pp. 21s.]

The genesis of this book is unusual. It was originally prepared to provide a background knowledge of German law for the members of the Control Commission in the British Zone of Germany. It would, however, be a mistake to regard this *Manual* as of purely temporary interest. The publishers were fortunate in entrusting its execution to the hands of a most distinguished team of writers, who have combined to produce what appears to be the most important work on modern foreign law published in English since Sir Maurice Amos' and Dr. Walton's *Introduction to French Law* (1935). The book should appeal to the English practitioner and the comparative lawyer alike. The *Manual* is not, of course, designed to replace in concrete instances resort to expert opinion but it should go a long way towards lessening the notoriously great difficulties of communication and understanding between English and German lawyers in matters where the conceptions of common law differ fundamentally from those of German law.

The various parts of the book are the work of different writers but it is perhaps permissible to make three observations referring to it as a whole. The *Manual* offers a great deal of information on specific rules of German law —it is a reliable work of reference. It cannot, however, be regarded as a suitable introduction to the study of German law. It does not equip the reader with the knowledge needed to approach any problem which is not dealt with in the book. Admittedly, the work was meant to be essentially elementary and

utilitarian. Yet, in this reviewer's opinion, its utility would have been greatly increased if the authors had placed a heavier emphasis on such matters as sources of law, legal interpretation and, generally, the method of work of German lawyers. In his most interesting introduction Dr. Cohn refers to these topics but much more would be welcome, even at the cost of omitting some details of substantive law. The reader is told, for instance, that although statute and custom are the only two sources of law, very great attention is given to judicial decisions. He would like to know more about their formal place within the German legal system and the gradual hardening of the constant practice of the courts into a customary rule. The cursory treatment of the important topic of legal interpretation is particularly to be regretted. Both France and Germany are faced with the problem of adapting their ageing Codes to new conditions. Both, in effect, have abandoned the traditional method of interpretation which strove to discover the intention of the legislator. But whilst the French favour the *méthode téléologique*, endeavouring to find the solution which would best satisfy the existing social needs at the cost of straining the meaning of the provisions, the Germans make occasional use of the numerous general formulas of their Code, such as that of good faith (thus in theory remaining faithful to the traditional method). Resort to these general principles is not restricted to cases for which the Code contains no specific rule. As a result, a wide and somewhat uncertain measure of discretion is available to the judge, a fact which must always be borne in mind by a student of German law. The *Manual*, in the second place, at times assumes too much knowledge of German law on the part of the English reader. This is particularly true of the sections dealing with Private International Law and Criminal Law. It contains in two medium-size volumes not only a considerable part of German substantive law and procedure but also references to judicial decisions and juristic writings. One feels that on too many occasions explanation has been sacrificed in favour of information, with the result that some passages are hard to follow. Finally, it seems very unfortunate that such an important work should be marred by a great number of misprints, particularly in the citation of English cases, which destroys confidence just a little (for instance—Vol. I: pp. 28, 73, 106. Vol. II: pp. 6, 16. Page 108, Vol. I, is enlivened by the phrase "*théory de la risque créée*").

The section on Civil Law is by Dr. E. J. Cohn. There was already a work in English on this subject by Dr. E. J. Schuster, but as it appeared in 1907 much of it is now out of date. The author follows the arrangement of the BGB. He discusses in turn the General Part of the Code (in many ways its most original feature), Law of Obligations, Law of Property, Law of Domestic Relations and Law of Succession. He does not limit himself to the statement of the actual articles but shows their working in practice. Many hypothetical cases provide examples throwing much light on difficult points. The result is in the nature of a brilliant *tour de force*: the reader is given a clear and accurate picture of a vast field of German law and he will be particularly grateful for the skill with which he is led through the labyrinth of nullity of marriage, annulment, divorce, legitimacy, tutorship and curatorship. It seems, however, a pity that Dr. Cohn found no space to deal more fully with the topic of impossibility of performance. German law on this subject provides a good illustration of the measure of discretion enjoyed by German judges in civil cases. It goes beyond the actual physical impossibility and embraces the cases wherever, in the opinion of the judge, the supervening events have created an "excessive difficulty" in the way of performance and it would be contrary to the rules of good faith and fairness in transactions to demand it. On numerous occasions Dr. Cohn refers to English Law. Most of his remarks are apposite and correct, yet to some exception must be taken. It is a strange slip to say (p. 126) that "in the case of an English mortgage the mortgagee becomes the owner of the property in question while the mortgagor retains an equitable right in the property." Not all English lawyers (and very few American) will agree that (p. 97) "the importance of the conception of unjust enrichment in

German law is vastly greater than it is, and will ever be, in English law." It is somewhat misleading to say (p. 86) that "the principle of German law (differing in this respect from Roman law as well as English law) is that the vendor warrants title," without any mention of *Eichholz* v. *Bannister* (1864) 17 C.B.(N.S.) 708, and section 12 of the Sale of Goods Act, 1893. These, however, are minor criticisms detracting but little from the excellence of the work which can be wholeheartedly recommended as a reliable guide to German Civil Law.

The last part of Volume I, devoted to Commercial Law, is written by Dr. Martin Wolff. He gives a masterly account of this difficult and technical branch of German Law. Dr. Wolff stresses (p. 210) that "the whole continent of Europe (except the Scandinavian States) and the whole of South and Central America have developed and still maintain a distinction between civil law and commercial law," but notes that in Germany the need for a commercial code side by side with a civil code was far greater before the enactment of a single civil code for the whole of Germany than it is now. (He might have added that Switzerland and Italy have now abandoned this duality of codes.) With an apparently effortless ease the author leads the reader through the bewildering number of various kinds of companies and partnerships produced by German law. The German equivalent to the English company limited by shares differs greatly from the latter in respect of the organisation of the company and the relationship between the management and shareholders. The Companies Act, 1937 (which was not incorporated into the HGB) emphasises the interest of the public in large corporations. Section 70 provides that the management of the company is to be guided, not by the interests of the shareholders as such, but by the interests of the company, the interests of the employees and workmen and the "common weal of people and Reich." Dr. Wolff denies with considerable force that the Act is inspired by the Nazi ideology (a view which is not shared by all German writers). One feels, however, somewhat reluctant to accept Dr. Wolff's assurance (p. 239) that "the true interest of the shareholders will hardly ever differ from the interest of the enterprise and from the public good." On p. 245 the author writes "alterations of the memorandum are mostly made in respect of the object of the enterprise or of an increase or reduction of the capital. The consent of the court to the alteration is not required—another notable difference between English and German Company Law." This requires amendment in view of section 5 of the Companies Act, 1948.

Volume II of the *Manual* opens with an account of German Private International Law. This part, written by Dr. Cohn, is a masterpiece of compression. The author's aim seems to be to provide the practitioner with a brief and accurate statement of German Law (a somewhat intricate task as the enacted law covers only a small portion of this subject and many rules have been evolved by practice and juristic writings). In this he eminently succeeds, although this reviewer feels that the attempt to cover such a wide field within a narrowly restricted space makes the reading difficult. On p. 3 Dr. Cohn notes that "there can be little doubt that the nationality rule has in many cases led to most undesirable results, especially in view of modern conditions of mass emigration due to political oppression." A fuller discussion of this most topical problem would have been welcome. In particular, it would be interesting to have some information as to the attitude of German courts in this matter and as to whether the efforts of the late Professor Niboyet to substitute in such cases the test of habitual residence for that of nationality have had much echo in Germany.

In the succeeding section Dr. Cohn and Dr. G. Meyer give a lucid summary of the vast and technical subject of Civil Procedure. If the result is somewhat disappointing it is because, in the nature of things, no short compendium on procedure can convey a clear idea of the practice of the courts. More examples of written pleadings would have been useful in view of the fact that under

the German system peculiar importance is attached to them, the oral hearing being frequently merely formal.

The last two parts of the *Manual* are devoted to Criminal Law and Procedure. Dr. K. Neumann begins with a few remarks on the history of German Criminal Law. It would, perhaps, have been worth while to devote a little more attention to the general character of the German Criminal Code of 1871. This Code is merely a revision of the Prussian Penal Code of 1851 which in turn was greatly influenced by the French *Code Pénal* of 1810. The doctrine of *nulla poena sine legé* is rigidly applied. The punishment is to fit the crime and not the criminal. Judicial discretion is fettered. Adequate measures of prevention and reform are lacking. This emphasis, acceptable in 1810, was less so in the last quarter of the nineteenth century when new political and legal ideas were making their appearance. In a sense the German Penal Code became antiquated very soon after it was passed. In the twentieth century six new drafts of the Code were prepared but little was done before the rise of the National Socialists to power. The control Council abrogated most of the Nazi criminal laws, with the exception of some purely technical legislation without political significance (such as, for instance, an Act of November 24, 1933, providing means for dealing with habitual criminals and measures of preventive detention, which was in fact prepared during the period of the Weimar Republic as part of the general reform of criminal law). Dr. Neumann gives a succinct and lucid account of the contents of the Code, subsequent Statutes and Control Council Legislation. He performs his task with great versatility, although the problem of finding adequate terminology must have been perplexing. The reader will find much in this part that is interesting and instructive, but it may not be easy for him to grope his way through some of the pages. (In particular, the section on "The Parties to an Offence" is hard to follow.)

The *Manual* concludes with a section on Criminal Procedure. It forms a necessary complement to the preceding account of criminal law. Dr. Neumann notes the numerous differences between the English and the German system. The most striking is the unfettered freedom of the German judge in admitting and determining the weight of evidence. There is, therefore, no place for much of the law of evidence as known to English lawyers.

This is a valuable publication and a very welcome addition to the meagre literature on foreign law in English.

J. K. Grodecki.

Law and Society in the Relations of States. By P. E. Corbett. [New York: Harcourt, Brace & Co. 1951. x and 337 pp. $4.75.]

Law and Peace. By E. D. Dickinson. [Philadelphia: University of Pennsylvania Press; London: Geoffrey Cumberlege. xii and 147 pp. 26s.]

Professor Corbett states that "the materials and the literature of what is known as international law or law of nations serve a useful purpose. They are used as instruments of national policy. Their invocation is one of the forms or stages of diplomacy. They assist in the relatively smooth dispatch of much international business, and it is probably true that in so doing they reduce the occasions of recourse to violence." Both he and Professor Dickinson are concerned with showing how international law at the present moment is made to fulfil the function of an ideology, and in so doing indicate many of its apparently inherent weaknesses.

Professor Dickinson refers to the vigorous way in which the United States has insisted upon the three-mile territorial belt, but cites the Truman Proclamation without discussing its implications and effects. Similarly, it is difficult to agree that the International Court of Justice in the *Corfu Case* "found Albania responsible for the explosions and for the resulting damage and loss of life on evidence obtained by the (illegal British) mine-sweeping." It is likewise difficult to accept unquestioningly, particularly in a cold war era, that "upon the whole . . . it will be found that international agreements are as well or even better observed than contracts in private law." He has no doubt, however, that the individual is nothing more than an object of international law.

On the status of the individual Professor Corbett considers that the Nuremberg Trial proves his personality in international law, and he considers that the non-recognition of this status "is an instance of the statesman's recourse to juristic reasons for maintaining the status quo." While there is still some controversy as to the existence of any fundamental rights of States, there seems little doubt that an infringement of the territorial integrity of an existing international person would amount to an international delict. Professor Corbett, however, goes further and states that "the duty to respect the territorial integrity and political independence of a community possessing the characteristics of a State not yet recognised is no less and no more binding nowadays than it is in relation to recognised States." This is true only to the extent that all the inhabitable parts of the world are already under the sovereignty of recognised States.

Both books, but particularly *Law and Society in the Relations of States*, are valuable contributions to the sociology of international law. Few would argue with Professor Corbett that in the cold war "each side cherishes values that it does not yet believe will be secure in one society to which all States will be subordinate," and most will agree with his analysis of the role of the little Powers at the present moment: "By playing upon . . . the antagonisms of the great States . . . even weak communities cannot merely assert autonomy, but use methods and achieve ends that run counter to collective interests."

The two authors tend to diverge in their opinions as to the way ahead. Professor Corbett believes that "the future of any law of nations and that of international organisation is one and the same." He does not, however, see the future in concepts of Western Union, but favours the establishment of a "Commonwealth" relationship. He believes that what is fundamental is the vindication of human rights and calls for a "re-orientation of the United Nations round this focal point." Professor Dickinson, on the other hand, calls for a wider use of international judicial settlement advocating the introduction into the international sphere of courts on circuit or bilateral commissions with a wide jurisdiction. Nor does he pin his faith to the propagation of an idea. Instead, he asserts that "the irreducible minima of uniformity are a uniform tolerance of essential diversities and a uniform acceptance of the principles and practice of reconciliation," and he is of opinion that "the conditions of reconciliation which may ultimately be exploited successfully will be conditions of substance and not exaggerations of an idea."

L. C. Green.

The Conflict of Laws. By Professor R. H. Graveson, LL.D., S.J.D., Professor of Law in the University of London. Second Edition. [London: Sweet & Maxwell, Ltd. 1952. 35s. net.]

Professor Graveson has continued to provide a comprehensive yet manageable textbook on a subject which always affords difficulty to his acknowledged public, those law students "approaching the conflict of laws for the first

time." It is perhaps inevitable from the very nature of the subject that most of the standard works accessible to the student become involved in their treatment of the many controversial issues; yet the need for a shorter treatment remains, and Professor Graveson meets this need by including these difficult issues but at the same time treating them as secondary to the main task of outlining the law. The perplexed student, for whom the wood has become obscured by the trees, will find the book of inestimable value and can return to tackling the "trees" of the larger works with increased understanding and vision. The growth of the book by some 50 or so pages is compensated for by the inclusion of over 50 recent cases.

The problem of Renvoi is adequately dealt with in 12 pages; yet there is sufficient doubt about the validity of *Kotia* v. *Nahas* [1941] A.C.[P.C.] as an authority on the English conflict of laws to make one wish that Professor Graveson, in adverting to Wynn-Parry J.'s dilemma in *Re Duke of Wellington* [1947] Ch., would indicate to what extent he considers the case an authority. It is also not possible to accept without some hesitation the statement that the decision in *Shaw* v. *Gould* "should be limited to the special facts on which the judgment is founded, *i.e.*, the invalidity of a foreign decree of divorce of persons of English domicile" (p. 139). Certainly the headnote supports this view, but the question for Lord Cranworth was "namely, how far the status of legitimacy or illegitimacy attaching to a subject of this country may or ought to be modified by the laws of another country." In Chapter 13 the author assumes for the purposes of jurisdiction that there is a distinction between British subjects and aliens (p. 266, footnote (*g*), p. 273). In view of section 3 of the British Nationality Act, 1948, which, for the purposes of criminal jurisdiction limits the liability of citizens of the Commonwealth countries other than citizens of the U.K. and Colonies and Eire, it might perhaps be wiser to distinguish between citizens of the U.K. and Colonies and aliens, rather than between British subjects and aliens. Certainly the presumption now must be that statutes of extraterritorial operation apply only to that class of British subjects called "Citizens of the U.K. and Colonies."

In dealing with the exemptions from jurisdiction, Professor Graveson states; "Nor will any action lie in respect of the property of a foreign sovereign" (p. 299). This statement may need qualification in view of dicta of their Lordships in *Sultan of Johore* v. *Bendahara* [1952] 1 All E.R., a case reported after publication of this book. The question whether immunity extended to immovable property within the territorial jurisdiction of the court did not fall to be decided, but clearly their Lordships did not recognise any absolute rule that a foreign sovereign could not be impleaded in our courts in any circumstances. Again, in referring to the immunities of international organisations and their representatives, the legislative measures covering this point are stated to be the Diplomatic Privileges (Extension) Acts, 1944 and 1946; it would be as well to make some reference to the amending and consolidating statutes of 1950, *i.e.*, the International Organisations (Immunities and Privileges) Act, and the Diplomatic Privileges (Extension) Act.

In his treatment of the problem of Choice of Law, Professor Graveson points out the special provisions of the Matrimonial Causes Act, 1950, setting up a choice of law for cases falling under section 18 of the Act; he concludes that this provision "will, therefore, exist side by side with any general choice of law rule there may be" (p. 378). Does this phrasing suggest that the provisions of the statute will not override, so far as an English court is concerned, any general rule in relation to cases covered by section 18 of the Act?

In a new chapter 20, entitled the "Limit of Application of Foreign Law," the author deals briefly with the exceptions to the normal enforcement or recognition of foreign judgments and legislation. Certain questions arise to which the short answer may be that they are best left aside in an elementary textbook; however, one may ask whether confiscation and requisition are safely dealt with without making any distinction between the two, and where,

assuming the necessity for adequate compensation, the judgment as to what is adequate must be made.

These are tentative suggestions which in no way detract from the value of the book as a textbook for students; in assessing the value of the book it is fair to point out that Professor Graveson has produced a companion casebook. The marriage between the two is a happy one and fully justifies the aims of the author.

D. W. Bowett.

Vormundschaft und Treuhand des Römischen und englischen Privatrechts in ihrer Anwendbarkeit auf Völkerrechtlicher Ebene. Eine Studie zur Strukturproblematik des Völkerrechts. By H. A. Schwarz-Liebermann v. Wahlendorf. [Tübingen: Verlag J. C. B. Mohr (Paul Siebeck). 1951. 141 pp. Dm. 15.]

The author of this attractively written essay describes the similarities in the development and the structure of the institutions of tutela and fiducia in Roman law and of guardianship and trust in English law. He finds a parallel for both in institutions of international law, *i.e.*, for tutela and guardianship in the mandate and trusteeship systems set up under the League of Nations and the UNO and for fiducia and trust in the administration of Germany by the Allied Control Council. The use of private law conceptions for the development of international law is justified at length in an ambitious introductory chapter, which is somewhat out of proportion to the two brief chapters which form the bulk of his work.

The results at which the learned author arrives would seem to be open to few objections. His opinion on the nature of the occupation of Germany has the further advantage of representing in the main the view officially sponsored by the occupying powers of the West. It is another question whether these results are very novel and whether a great deal is gained by them in practice. One may well feel that the author by the great learning with which he has justified his conclusions and by the pleasant form in which he has set out his findings has done little more than whet his readers' appetites for more nourishing food which so far he has failed to supply. General structural similarities in historical lines of development are no doubt interesting. So are likenesses in the functional character of legal institutions in different legal systems. Both, however, are far less significant than the practical results on questions of detail which can (or must or should) be derived from them. If the author would have gone a little more deeply into these problems of detail, he would have found plenty of problems to engage his attention. To mention one instance only: if it is true (as the present reviewer thinks it is) that the mandated territories were administered under a sort of tutela and guardianship, how is it possible that the Trusteeship Council could approve of the confiscation of all assets in these territories belonging to ex-enemy nationals of the administering Power, notwithstanding the fact that the mandated territories were declared not to be at war? If this is merely an instance of a persisting imperfection of international law, how can it be removed? Perhaps it is not too much to hope that the author may follow his work by an investigation of the bearing which his general findings have on those problems of detail and practice which constitute the real life of the law. The high quality of his present work will, no doubt, secure for him an interested audience.

E. J. Cohn.

Quellen zum Staatsrecht der Neuzeit. Vol. 2: Deutsche Verfassungsdokumente der Gegenwart (1919–1951). Edited by Ernst Rudolf Huber. [Tübingen: Dr. M. Mathiesen & Co. K.G. 1951. 694 pp. Dm.32.]

This work is undoubtedly an indispensable tool to any serious student of German constitutional history. It contains in addition to the Weimar Constitution the Basic Law of the Bonn Federal Republic and the constitution of the East German State a full reprint of all the present Länder constitutions and a very good selection of other documents of importance to the understanding of both the present legal situation of Germany and its development since 1945. This section includes not only the fundamental enactments of the Occupation Powers, such as the Charter of the Allied High Commission, the Agreement on the International Ruhr Authority, the Saar Convention and the Constitution of the Saarland, but also many documents which are not of a strictly legal character, but of political or merely historical significance, such as the Grotewohl letter on the unification of Germany and the reply of the Federal Government, documents on the Oder-Neisse frontier, Dr. Schumacher's declaration on the German Defence contribution of October, 1950, and others. Nevertheless, the work does not entirely come up to expectations. It is not a collection of German constitutional documents from 1919 to 1951, but merely one containing documents from 1945 to 1951, preceded by a reprint of the most important documents from the Weimar period (which unfortunately does not include the Prussian Constitution of that time).

It is a little surprising that the Editor has thought fit to treat the Nazi period with such neglect. During that period he has played a very important part, having been one of the leading lights among the constitutional theoreticians of National Socialism. His works include essays on the "Head of the State of the German Reich" (1935), "The Totality of the Racial State" (1934), "The Legal Nature of the NSDAP" (1939) and—last, not least—a students' textbook on the constitutional character of the Third Reich, which has run into two editions. In all these works he has shown himself as a skilful and enthusiastic expositor of Nazi ideology and Nazi practice. One notices with some surprise that he now—alas belatedly—comes to the conclusion that the Reichstag Fire of 1933 was possibly the work of Nazi terrorists and that the Decree "for the protection of the People and State" of 1933 was abused by the régime which he so loyally served. Apart from this Herr Huber has not at any time in public withdrawn a single word of the rubbish which he produced in the service of his late masters. One would not waste many words on him, if it were not for the fact that he is not the only case of a prominent Nazi theoretician who is attempting to stage a come-back. It does not seem to occur to him that only those who share either his misdeeds or his former convictions will rejoice at such a return. Those to whom learning is more than

> a cobweb of the brain,
> profane, erroneous and vain

will presumably feel that its halls are better left severely alone by those who have abused their learning in order to counsel, assist and commend the perpetrators of the greatest crimes of all times. One must wonder at the tactlessness or ignorance of those German publishers who present to the public once more the names of these guilty men. By doing so they lend notable and unfortunate support to those who say that in the Federal Republic all facilities are now thrown open to Nazis wishing to resume their activities. It is true that on the present occasion Herr Huber's contribution is as innocuous as can be. But surely there are enough scholars in the Germany of 1952 who can edit a collection of this type without conjuring up memories such as are inevitably associated with the name of E. R. Huber. Has the lenient world, which has restored to him and his like a freedom utterly incompatible with the system

of oppression which his group created, not the right to demand that the one-time oppressors should enjoy this freedom in polite silence?

E. J. Cohn.

Current Legal Problems 1952. Edited by George W. Keeton and Georg Schwarzenberger. Vol. 5. [London : Stevens & Sons, Ltd. 1952. vii and 339 pp. £1 17s. 6d.]

The fifth volume of this series contains fourteen public lectures delivered in the Faculty of Laws at University College, London, during 1951–52, as well as the address on "The Need for a New Equity" which Denning L.J. gave to the Bentham Club, which he has since in substance repeated on the wireless and which certainly does not lack the reforming spirit, though this does not extend to the universities; on the contrary it is in them that the learned Lord Justice finds the new spirit capable of producing the new equity.

Professor Keeton deals with the "Director and Trustee" and concludes that frequently the courts dealt with him in a spirit of leniency; but it should be remembered that, if this were not so, it would be impossible to find professional men willing to serve as directors. Nationalisation is the key-note of three lectures on "Nationalisation in Legal Perspective," "The Law and Ethics of the Compulsory Acquisition of Land" and "Hospitals and the National Health Service Act" by Mr. Scammell, Mr. Fitzgerald and Dr. Marshall respectively. Mr. Holland contributes a useful paper on "High Court Control of Inferior Tribunals," while Professor Glanville Williams' paper on the "Law of Abortion" is of particular interest from the point of view both of legal analysis and legal reform. Mr. Richard O'Sullivan writes on "Officialdom and Infancy." Mr. Lloyd's paper on the Reform of the "Law of Libel" was read before the Defamation Bill, since enacted, was introduced into the Commons and is, therefore, now largely obsolete. Mr. Payne's lecture on *Re Polemis* is a valuable contribution which should be read in conjunction with Dr. Goodhart's article in (1952) 68 L.Q.R. 514. While Mr. Ivamy writes on the somewhat special subject of "Hire Purchase and the Law," Mr. Powell takes a broad view of "Roman Contribution to the Reform of English Law" and thinks that "clear and refreshing water may often come from an old well." The last three papers are devoted to International Law, Dr. Cheng writing on "The International Law Commission," Mr. Green on "Legal Aspects of the Schumann Plan," and Dr. Schwarzenberger on the "Protection of British Property Abroad." In view of the private investor's "comprehensible tendency to refrain from investments abroad" Dr. Schwarzenberger sees the future of foreign investments in business done "by, or under the tactful but firm guidance of, international institutions."

It is to be hoped that University College will continue not only the public lectures, but also their publication.

F. A. Mann.

Income Tax Law and Practice. By Cecil A. Newport, F.A.C.C.A., and Oliver J. Shaw, Barrister-at-Law. [London : Sweet & Maxwell, Ltd. 1952. xxxviii and 397 pp. 27s. 6d. net.]

Merely to state that 24 editions of this well-known work have appeared since it was first published in 1927 bespeaks its value to its own particular public. The work is essentially one for the practical man, the accountant or company secretary, and is not intended for the lawyer *pur sang*. The original preface makes this clear by its insistence on the absence of "legal jargon" and its emphasis on practical arithmetical illustrations which occupy nearly one-third of the present edition.

It would, therefore, hardly be fair to criticise the book from the purely legal angle but attention must be called to certain points for consideration of the authors in their inevitable further edition.

Considering the emphasis placed on the "practical" side of the subject it is surprising how few arithmetical examples (only three) there are in Chapter 5, "Allowances in respect of Capital Expenditure," a topic which lends itself peculiarly to this mode of treatment; cross-references at least might be made to pp. 138–40 where examples of wear and tear of business assets are worked out.

In view of the treatment of trade debts, the statement at p. 76 that income is only taken into account when it is received and not when it arises or accrues requires some qualification. The treatment of section 137 (a), Income Tax Act, 1952,—"expenses not incurred wholly and exclusively for the purposes of the trade," wrongly quoted in the text—with the barest possible reference to *Strong & Co.* v. *Woodifield*, 6 T.C. 671 (p. 111) and the omission of *Smith's Potato Crisps, Ltd.* v. *Bolland*, 30 T.C. 267 is inadequate; the latter case should have been quoted in preference to *Worsley Brewery Co., Ltd.* v. *C. I. R.*, 17 T.C. 349, at p. 113 and to *Rushden Heel Co., Ltd.* v. *Keene*, 30 T.C. 298, at p. 115. "Excess Rents" is a subject which also lends itself peculiarly to arithmetical exposition but no examples are given in the very brief discussion on this topic at pp. 188–9. Chapter 15, Schedule E, is disappointing with its disproportionate emphasis on the liability of clergymen in contrast to the much more important subjects of compensation for termination of office or employment—12 lines and a footnote at p. 201—and of "expenses wholly necessarily and exclusively incurred in the performance of the duties" at p. 195. The omission in the section on "Bank Duty" and "Penalties" at pp. 306–12 of the leading cases such as *Att.-Gen.* v. *Till*, 5 T.C. 440 and *Att.-Gen.* v. *Johnstone*, 10 T.C. 758 is somewhat surprising.

These are, however, only blemishes on an excellent practical work which can thoroughly be recommended to its special public. The arithmetical examples in Chapters 11 and 12 relating to the computation of taxable trading profits and of the "commencing" and "cessation" provisions could hardly be bettered, a remark which equally applies to Chapters 16–19 which deal respectively with the liability of partnerships, husbands and wives, executors and trustees, Double Taxation Relief and Irish income.

A. Farnsworth.

The Elements of Estate Duty. By C. N. Beattie, ll.b., Barrister-at-Law. [Butterworth & Co. (Publishers), Ltd. 1952. xxiv and 180 pp. 22s. 6d. net.]

Mr. Beattie has put all law students further in his debt by following up his *Elements of Income Tax Law* (reviewed at 15 M.L.R. 410–11) with a companion volume on Estate Duty; that both books have been prescribed by the Law Society for its Final Examination clearly bespeaks their worth.

Since *The Elements of Estate Duty* has been written wholly with an eye on the student, the learned author has eschewed the complexities of tax-avoidance. The work opens with an introductory chapter briefly glancing at the history of the death duties and the outline of the current system. The first chapter, the longest in the book, is an excellent one with its very clear exposition of the law relating to "Property passing or deemed to pass at death"; Mr. Beattie does not hesitate to break a lance with the authors of the major works upon the subject, *cf.* his disagreement with Green and Dymond as to "competency to dispose," p. 17, footnote 1. Other noteworthy chapters are those dealing with Gifts *Inter Vivos* (Chapter 3), Annuities (Chapter 6), Controlled Companies (Chapter 9), Valuation (Chapter 10) with a very good account of the controversy which came to a head in *I. R. C.* v. *Crossman & Mann* [1917] A.C.

26 (pp. 103–4) and "The Incidence of the Duty" (Chapter 13) with its illuminating account of the rules relating to apportionment of the duty between the various interests (pp. 144–52).

Unlike *Wooley* there are hardly any arithmetical examples of how the duty is computed in practice in complex cases but this is doubtless explained by the purely legal and examination angle of the book. The references to case and statute law are ample, while there is a really good index running to 14 pages. Any law student who has mastered the contents of this little, though tightly packed, work should find no difficulty in doing well in this subject in the Final Examination.

A. F.

Motorists and the Law. By K. McFarlane, ll.d. "This is the Law Series." [London: Stevens & Sons, Ltd. 1951. vii and 119 pp. 5s. net.]

This volume maintains the high standard earlier achieved in this series. The author, who has had 16 years' experience of sitting in a magistrates' court, is well aware of the numerous legal problems both civil and criminal which are involved in the ownership and user of a motor-car. He handles them with clarity and accuracy, and if what he has to say on such intractable problems as "special reasons" for not disqualifying a driver found guilty of such offences as dangerous or careless driving is somewhat superficial, it is at any rate not likely to mislead.

In his first chapter, a distinctly amusing one, Dr. McFarlane takes a young man out for a drive in which he succeeds in making him commit no fewer than 30 different offences in a space of five pages: some of these are perpetrated with considerable frequency by motorists who are quite unaware that they are doing wrong. In an appendix he gives a valuable table of "speeds and braking distances," from which we find that when a car is going at 60 miles per hour it travels 44 feet before the brakes begin to operate, and 216 feet before it comes to a stop, that is assuming normal conditions and brakes 70 per cent. efficient.

C.

Short Forms of Wills. By Henry Brighouse, Solicitor. Sixth Edition by Edward F. George, ll.b., Solicitor, and James H. George, ll.b., Solicitor. [London: Sweet & Maxwell, Ltd. 1951. xii and 102 pp. and (index) 4 pp. 15s. net.]

This short and useful work is, in the words of its subtitle, "Adapted to the Requirements of the Middle Classes Traders and Farmers." In its original form it was the work of a country solicitor with an extensive practice and first-hand experience of the spheres denominated in the subtitle, and the fruits of this experience were garnered for the benefit of the profession. The fourth and fifth editions contained annotated texts of the Inheritance (Family Provision) Act, 1938. Reliance on literature exclusively devoted to that statute has suggested its omission from the present edition. The set of common form clauses, together with forms of beneficial trusts, which proved so useful in the earlier editions, reappears in Part One. Part Two consists of General Precedents of Wills and Part Three Wills of Traders and of Farmers. It is these last two parts which give to the work its distinctive character and form its most valuable and helpful feature. The editors might well consider the addition of annotation, referential in nature, to both statutes and cases. If these annotations were to remain merely referential, and not by way of

epitomized commentary, it would not necessitate a considerable expansion of the volume in size, a volume which is at present quite slim, as law books go. This annotation might serve as a cautionary signal to draftsmen when junction points are reached, at which deviation from the phraseology, built upon experience, might land the draftsman into danger. This is only an extension of what the editors have felt necessary in valuable notes printed at the head of several of the precedents. The present edition continues the practical utility of a book which was hailed at the outset as a distinctive accession to the practitioner's library, and should secure a welcome place at the working desk.

Conveyancing Costs. By J. L. R. Robinson. [London: The Solicitors' Law Stationery Society, Ltd. 1951. 88 pp. and (index) 6 pp. 7s. 6d. net.]

Probate and Administration Costs including Trustees' Costs. By J. L. R. Robinson. [London: The Solicitors' Law Stationery Society, Ltd. 1951. 55 pp. and (index) 3 pp. 5s. net.]

These two booklets form part of the series of "Oyez Practice Notes" which the publishers have issued in recent years and have proved of such excellent service to practitioners in both branches of the profession. Both these booklets have been compiled by the author of the articles on costs which have been a regular feature of the *Solicitors' Journal* for some time. Like the "Oyez" series as a whole, these booklets do not profess to provide comprehensive treatment of their subjects, their size alone would negative any such suggestion, but they afford most useful guides, concentrating on fundamentals and essentials, with ample requisite reference to the authorities to guide the reader to the sources of authority and further information. Both these booklets are, in substance, a reprint of the articles which have met with so much appreciation by practitioners. The Precedents of Costs in each booklet add to their utility and serve as illustrations to the text.

Bertram B. Benas.

Town and Regional Planning Law in Ireland. By John Miley and Frederick C. King, of Kings' Inns, Barristers-at-Law. [Dublin: Browne & Nolan, Ltd., The Richview Press. 1951. xv and 200 pp. (index) 2 pp. 21s. net.]

This is a textbook upon the statutes in Ireland parallel to those in England dealing with Town and Country Planning. In their preliminary chapter on the interpretation and purposes of the Acts the learned authors refer to the use of the word "regional," a distinctive turn of phraseology from that of the English legislation, and observe that in Ireland "it is applied to any area for which a planning scheme can be made extending beyond the limits of a single planning district." The word would apply, for instance, to a combination of a country town with a small surrounding portion of a county if the urban authority and county council decided that these areas are to form a planning region, and equally well to a combination of several planning districts made for the purposes of a joint planning scheme for the whole area on broad lines to which the several schemes for the districts are to conform. The chapters follow by way of a narrative exposition of the general scheme of the Acts. Part Two is devoted to an annotated edition of the Town and Regional Planning Act, 1934, and Part Three on similar lines to that of the Amendment Act of 1939. The appendix is devoted to the Planning Regulations,

unannotated, of the two statutes referred to. The rest of the work is taken up with the apparatus of index, tables of cases and statutes. A notable feature of the book is that the notes are printed in larger type than the text of the statutes. The cases cited are relatively few in number, 15 in all, of which 11 come from English reports and one from New Zealand. Perusal of the work will prove of interest for the study of the comparative law on the subject, and serves to show that in the broadest sense of the term, as familiarised by Sir Frederick Pollock, Eire still remains a country of the Common Law. There is a commendatory foreword by the Honourable Conor A. Maguire, Chief Justice of Ireland.

Bertram B. Benas.

The Modern Law of Water Supply. By E. J. O. Gardiner, Solicitor. [London : The Solicitors' Law Stationery Society, Ltd. 1949. lxiv and 591 pp. £5.]

This book presents its material in the form of annotations on the Water Acts, 1945 and 1948, and the relevant parts of the Public Health Act, 1936. An Appendix contains the Reservoir (Safety Provisions) Act, 1930; the Statutory Orders (Special Procedure) Act, 1945; a few sections of the Local Government Act, 1948; and some statutory orders. The Water Act, 1948, was passed too late for its provisions to be fully incorporated into the text which however carries page references to the amendments set out in an Appendix. A large number of cases and statutes is cited (the tables cover 52 pages) and the annotations are clear and well stated. It is difficult to appraise these statutory annotations save after continued practical use but this volume seems to cover its ground well. It costs a lot.

J. A. G. Griffith.

Current Law Guide No. 9. Intestates' Estates and Family Provision. By D. C. Potter, ll.b., Barrister-at-Law. [London : Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. 1952. ix and 74 pp. 8s. 6d. net.]

Current Law Guide No. 10. The Defamation Act, 1952. By Richard O'Sullivan, q.c. [London : Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. 1952. ix and 50 pp. 8s. 6d. net.]

Mr. Potter has written two chapters explaining the present law of intestate succession and family provision and illustrated them by a series of examples. Mr. O'Sullivan deals with the origins of the Act, the changes in the law and also provides a full commentary on its text. Both authors have succeeded in providing admirable guidance in subjects of some difficulty and great practical importance.

Current Law Consolidation. 1. 1947–1951. General Editor : John Burke. Consolidation Editor : Clifford Walsh. [London : Sweet & Maxwell, Ltd. Stevens & Sons, Ltd. 1952. £9 9s. net.]

This volume contains 11,123 paragraphs summing up the law made and applied in the five years 1947–51, besides a complete list of all the statutes, statutory instruments, cases of this period, and 53 pp. of closely printed index. The *Current*

Law Year Books which it replaces have achieved enormous popularity and the publication of this volume represents a still higher achievement of industry and skill in compilation. When measured against the time that can be saved by the use of this book its price will appear moderate.

Books and Publications Received :—

THE LAWYER'S COMPANION AND DIARY, 1953. Part I. By ERNEST L. BUCK. Part II. By LESLIE C. E. TURNER. [London : Stevens & Sons, Ltd. xxiii and 162 and 1519 pp. 22s. plus 5s. 6d. Purchase Tax.]

PUFFS, BALLOONS AND SMOKEBALLS. By A. L. POLAK. Illustrated by LESLIE STARKE. [Justice of the Peace, Ltd., Little London, Chichester, Sussex. 1952. vii and 137 pp. 12s. 6d. net.]

ROMAN LAW IN SOUTH AFRICAN PRACTICE. Inaugural Lecture delivered before the University of Cape Town on November 6, 1951, by B. BEINART, Professor of Roman Law. [Oxford University Press. 1952. 30 pp. 3s. 6d. net.]

THE BRITISH COUNCIL. Report for the Eighteenth Year. 1951–1952. [London : 1952. 104 pp.]

STEIN-JONAS. KOMMENTAR ZUR ZIVILPROZESSORDNUNG. 18., neu bearbeitete Auflage VON ADOLF SCHÖNKE. Lieferung 2 (160 Blatt). [Tübingen : J. C. B. Mohr. 1953. Subskriptionspreis Dm. 18.]

GUSTAV RADBRUCH : Eine Feuerbach-Gedenkrede, sowie drei Aufsätze aus dem wissentschaftlichen Nachlass. (Recht und Staat 172.) [Tübingen : J. C. B. Mohr. 1952. 34 pp. Dm. 1,90.]

GERHARD LEIBHOLZ : DER STRUKTURWANDEL DER MODERNEN DEMOKRATIE. Juristische Studiengesellschaft Karlsruhe, Heft 2. [Karlsruhe : C. F. Müller. 38 pp. Dm. 1,80.]

FLUORIDATION OF MUNICIPAL WATER SUPPLY. A Review of the Scientific and Legal Aspects. By CHARLES S. RHYNE and EUGENE F. MULLIN, JR. Report No. 140. 1952. [National Institute of Municipal Law Officers. 730 Jackson Place, N.W. Washington 6, D.C. 62 pp. $3.]

MAX PAGENSTEDIER : Wann hat der deutsche Richter eine Rückverweisung zu beachten? Sonderdruck. Neue Juristische Wochenschrift 1952. Heft 21. [München und Berlin : C. H. Beck'sche Verlagsbuchhandlung.]

MAYNE ON DAMAGES. Eleventh Edition. Second Supplement (to January 1, 1952). By PETER ALLSOP, M.A. [London : Sweet & Maxwell. 32 pp. 5s. net.]